

Susan Evans
3rd yr. law student;
trainee
bar in July
works Wed, Th. Fri

(301) 934-6100

- ① 19th Feb - Alan. if
we do nothing
- ② Dave ✓ disgruntled
employee (Feb. 3rd)
~~Worst case~~
Case goes Alan. on 19th
- ③ \$600 - 1200 to
Patent office to revive.

* Refile the Alan.
by the 8th

DAVID NEWMAN & ASSOCIATES, P.C.
Patent Attorneys & Counselors at Law
P. O. Box 2728
La Plata, Maryland 20646-2728
(301) 934-6100
Fed. Tax Ident. No. 52-1751512

Axon Corporation
101 West Robert E. Lee Blvd.
Suite 402
New Orleans, Louisiana 70124
Attn: H. Britton Sanderford Jr

BILLING DATE 12-31-92

ACC'T NO.

DBNAXNN-900

RE: Advice and Opinion
CORPORATE MATTERS

EXPENSES

-11-92 Facsimile to David B. Newman, Jr.

\$14.00

TOTAL FOR THE ABOVE EXPENSES

\$14.00

PREVIOUS BALANCE

TOTAL FOR CURRENT PERIOD

\$14.00

\$41.75

TOTAL

\$55.75

PAYMENTS

-15-92 Check No. 4765.

\$41.75

TOTAL PAYMENTS

\$41.75

AMOUNT DUE

\$14.00

DATE REC. 1-11-93
APPVD. BY: PLB
CODE TO: 500-625
VOUCH # 373 BOX 14.00
DATE POST: 1/15/93
CHECK # 327
DATE PD: 2/12/93

Please write your account number(s) on your check and make payable to:
DAVID NEWMAN & ASSOCIATES, P.C.

* * * THANK YOU * * *

Patent Attorneys & Counselors at Law
P.O. Box 2728
La Plata, Maryland 20646-2728
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Fed. Tax Ident. No. 52-1751512

Axon Corporation
101 West Robert E. Lee Blvd.
Suite 202
New Orleans, Louisiana 70124
Attn: H. Britton Sanderford Jr

BILLING DATE 01-31-93

ACC'T NO.

DBNAXNN-900

RE: Advice and Opinion
CORPORATE MATTERS

	TOTAL FOR CURRENT PERIOD	\$0.00
PREVIOUS BALANCE		\$14.00
	TOTAL	\$14.00
	TOTAL PAYMENTS	\$0.00
	AMOUNT DUE	\$14.00

AXONN CORPORATION

ACCOUNT NO.		VENDOR <i>Patent Counselors</i>		CHECK NO: <i>298</i>	CHECK DATE <i>2 11 93</i>	
VOUCHER	INVOICE #	REFERENCE	INVOICE AMOUNT	AMOUNT PAID	DISCOUNT TAKEN	NET CHECK AMOUNT
		<i>1-31-93</i>	<i>14.00</i>			<i>14.00</i>
					CHECK TOTAL	<i>14.00</i>

AXONN CORPORATION
OPERATING ACCOUNT
101 W. ROBERT E. LEE BLVD., STE. 202
NEW ORLEANS, LA 70124

WHITNEY NATIONAL BANK
NEW ORLEANS, LA
14-17/650

298

CHECK NO.	CHECK DATE	VENDOR NO.
298	2-11-93	

PAY Fourteen & 1/10 Dollars

CHECK AMOUNT
14.00

NOT NEGOTIABLE

Page 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

AXONN CORPORATION,
Plaintiff,

vs.

Civil Action No.
95-0796

DAVID NEWMAN and DAVID
NEWMAN AND ASSOCIATES, P.C., : Section "I"
and ABC INSURANCE COMPANY, : Magistrate 4
Defendants.

Waldorf, Maryland
Thursday, June 19, 1997

Deposition of

DAVID B. NEWMAN, JR.

called for examination at the Holiday Inn,
St. Patrick's Drive, Waldorf, Maryland, beginning at
9:00 a.m., before Karen Hinnenkamp, RMR, a Notary
Public in and for the State of Maryland, when were
present:

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For the Plaintiff:

STONE, PIGMAN, WALTHER, WITTMANN AND HUTCHINSON
BY: STEVE USDIN, ESQ.
BRYAN C. REUTER, ESQ.
546 Carondelet Street
New Orleans, Louisiana 70130-3588
504-581-3200

For the Defendants:

MCGLINCHY STAFFORD
BY: HENRI WOLBRETTE, III, ESQ.
KATHLEEN A. MANNING, ESQ.
643 Magazine Street
New Orleans, Louisiana 70130
504-586-1200
504-596-2737 (Direct - Manning)

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EXAMINATION BY COUNSEL FOR:

PLAINTIFF DEFENDANTS

WITNESS: (Mr. Usdin) (Mr. Wolbrette)

DAVID B. NEWMAN, JR. 7, 136, 317 315

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EXHIBITS

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BY MR. USDIN:

Q Mr. Newman, my name is Steve Usdin. We met a moment ago for the first time. I'm going to be taking your deposition. Have you ever had your deposition taken before?

A Yes.

Q So you know how it works.

A Yes.

Q I'm going to be asking the questions. If at any time you do not understand my question or you want me to rephrase it, please tell me to do so. Otherwise I will assume you understand the question. Agreed?

A Yes.

Q If you need to take a break, let me know. We will be taking some breaks.

Let me show you a document I would like to mark for identification. We are just going to go continually from what we did yesterday. The last one marked I have is P-12. Is that right?

MS. MANNING: Uh-huh.

MR. USDIN: So this will be P-13.

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1 Thereupon.

2 DAVID B. NEWMAN, JR.

3 was called for examination and, after having been
4 first duly sworn by the Notary, was examined and
5 testified as follows:

6 MR. USDIN: Usual stipulations?

7 MR. WOLBRETTE: All right. I think we
8 ought to congratulate ourselves because according to
9 my watch we are starting a minute early, which may be
10 the only time in the history of litigation we have
11 ever started early.

12 MR. USDIN: That's right. That's all I
13 have, thank you. Certainly the only one that has ever
14 finished before we were supposed to start. But the
15 usual stipulations?

16 MR. WOLBRETTE: Sure.

17 MR. USDIN: And it will be taken for all
18 purposes.

19 MR. WOLBRETTE: And you want to read and
20 sign.

21 THE WITNESS: Yes, definitely.

22 EXAMINATION BY COUNSEL FOR THE PLAINTIFF

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1 (The document referred to was
2 marked Plaintiff's Exhibit
3 No. 13 for identification.)

4 BY MR. USDIN:

5 Q Is that a copy of your professional resume?

6 A Well, let me read it first, just take a
7 quick look.

8 This is something as of a number of years
9 ago. I'm not sure what year. I wouldn't call it a
10 resume. We call it a firm biography. I'm not sure
11 what year. Sometime in the 1980s, but I'm not sure
12 which year.

13 Q I was going to ask you if you knew when
14 that was prepared.

15 A Sometime in the 1980s, because I was in
16 Rockville at that time, but I'm not sure.

17 Q When did you leave Rockville?

18 A We moved, the firm moved and came down here
19 on October 1st, 1989.

20 Q So this would have been prior to 1989 then.

21 A Yes.

22 Q Prior to October 1st, 1989 anyway.

Page 9

1 A Yes.

2 Q Take a moment if you will and just briefly

3 skim this. I'm really interested in pages four and

4 five.

5 A Yes.

6 Q I would like you to skim that because I

7 want to ask you a couple questions about it.

8 A Yes.

9 Q You have read it?

10 A I have read it.

11 Q Okay. And it's accurate at least as of the

12 date?

13 A As of that date to the best of my

14 recollection this is accurate, yes.

15 Q It accurately describes your educational

16 background; is that right?

17 A As best as I can tell, yes.

18 Q What do you mean as best you can tell?

19 A Well, I don't know if anything is omitted

20 from here that I'm aware of. That's what I'm

21 wondering. But everything in here is accurate, yes.

22 Q Okay. And you got your JD from American

Page 11

1 recognize that.

2 A Yes.

3 Q Is that a declaration that you signed?

4 A This is a declaration that was prepared and

5 I signed on April 28th, 1995. And at the time, on the

6 information I had in my possession at the time I

7 believed this declaration to be true and accurate. I

8 now know that there are some errors in this

9 declaration.

10 Q Okay. We will get to that. But everything

11 you said in that at the time you signed it for

12 submission to the U.S. PTO was truthful; correct?

13 A To the best of my knowledge at that time I

14 believed it was true, yes.

15 Q And you did not knowingly leave out

16 anything material, did you?

17 A Not that I know about. I'm not aware of

18 anything.

19 Q At the time you signed it you knew it was

20 for submission to the PTO?

21 A Oh, yes.

22 Q And you were signing that in what you

Page 10

1 University in 1983?

2 A Yes.

3 Q When did you take the Patent Bar?

4 A 1983.

5 Q And you passed it then?

6 A Yes.

7 Q Tell me what the obligations are of members

8 of the Patent Bar when practicing before the U.S. PTO.

9 A You have a duty of candor, duty of

10 disclosure. I think your question is otherwise vague

11 because I'm not sure what you are asking for

12 particularly.

13 Q But in dealings with the PTO you have a

14 duty to be truthful; is that correct?

15 A Absolutely.

16 Q You cannot knowingly submit anything false

17 to the PTO, can you?

18 A No.

19 Q Nor would you ever do that, would you?

20 A I would not.

21 Q Let me show you what has previously been

22 marked as Plaintiff's Exhibit 11. I ask if you

Page 12

1 believed at that time to be in full compliance with

2 your duty of candor?

3 A Yes.

4 Q And to be truthful?

5 A Yes.

6 Q And you knew it was being signed and

7 submitted under penalty of perjury; correct?

8 A Yes.

9 Q Which meant that if it was false, you would

10 go to jail or be imprisoned?

11 A If it was false --

12 MR. WOLBRETTE: You mean if it was

13 knowingly false.

14 THE WITNESS: If it was knowingly false.

15 BY MR. USDIN:

16 Q Yes.

17 A And at that time I thought this is what I

18 knew to be true.

19 Q Is there anything in there that you now

20 know to be false?

21 A Not false. Incorrect, yes.

22 Q Tell me about that.

Page 13

1 A Well, let's go through the paragraphs.
 2 I know paragraphs 55 now are incorrect, at
 3 least. There may be others here because I'm skimming
 4 this fast.
 5 Q Well, take your time. I don't want to rush
 6 you.
 7 A I'm not sure. Let's see. Paragraph 57 is
 8 incorrect. Paragraph 58 is incorrect. At least those
 9 paragraphs. There may be others, but I'm just going
 10 through this so fast.
 11 Q I would like you to take your time. I
 12 think this is important. Why don't you take your time
 13 and go ahead and read it then.
 14 A I have only discovered this in the last day
 15 or so.
 16 Q Okay. Discovered that those were
 17 incorrect.
 18 A Yes.
 19 (Brief pause.)
 20 Those are still correct. There is nothing
 21 there. These paragraphs so far -- I'm up to paragraph
 22 18. I think paragraph 48 is incorrect. I said 55?

Page 15

1 February 19th, 1993. I now realize that's not what
 2 happened.
 3 Q So you are telling me that at the time you
 4 prepared and sent in a 10-page declaration to the
 5 United States Patent and Trademark Office which you
 6 signed and in which you represented to them the cause
 7 for the missing of a date that you were now completely
 8 in error in saying that; is that right?
 9 A As of the information provided to me in the
 10 last two days, I have found that, yes.
 11 Q Information provided to you by whom?
 12 A By my attorneys. Information produced in
 13 this discovery.
 14 Q What information was that?
 15 A There is a memo of February 17th by Erin
 16 Pierce and that memo very clearly tells me that I
 17 didn't miss the date at all. Do you have the memo
 18 available?
 19 Q I would like to see what memo it is that
 20 refreshed your recollection.
 21 A I don't have it here, but maybe --
 22 MR. WOLBRETTE: I'm sure we have it.

Page 14

1 Q Yes.
 2 A Did I say 56?
 3 Q No, you did not. Are you saying that now?
 4 A Let me see.
 5 Q Just before you leave that page, I'm
 6 unclear on 56.
 7 A I'm unclear too. I'm unclear at this
 8 point. What I realized is that all of these things
 9 that happened were not responsible for the missing of
 10 a critical date of February 18th or 19th, 1993. A
 11 date wasn't missed at all. But at the time I prepared
 12 this declaration, when I reviewed my file, all we had
 13 were letters of January, I think it's January 1993 to
 14 Britton Sanderford, January 21st, 1993, and I had a
 15 communication from Erin Pierce in February of 1993,
 16 around the 16th. And then this was prepared two years
 17 later. I had nothing in my file to show I had
 18 responded to Erin Pierce's request in response to her
 19 letter of February 1993. And I just made an
 20 assumption that with reconstruction of all the things
 21 that were happening in my office that I must have
 22 screwed up and not advised or missed the date of

Page 16

1 THE WITNESS: Yes. This memo. February
 2 17th.
 3 MR. USDIN: Let's mark for identification
 4 this would be --
 5 MR. WOLBRETTE: Do you have another copy of
 6 that?
 7 THE WITNESS: I would like also the Erin
 8 Pierce letter of February 16th. I don't have that
 9 available either.
 10 MR. USDIN: We will see if we can get that.
 11 But we are talking about document AAX101270. We will
 12 mark that as P-14.
 13 (The document referred to was
 14 marked Plaintiff's Exhibit
 15 No. 14 for identification.)
 16 BY MR. USDIN:
 17 Q It is your testimony today under oath,
 18 which you understand you are under oath; correct?
 19 A Yes.
 20 Q It's your testimony here under oath that
 21 this document and the other memo from Ms. Pierce has
 22 now refreshed your memory that everything you said in

Page 17

1 the 10-page declaration dated April 28th, 1995 or that
2 the conclusions you reached in that declaration were
3 not true; is that right?

4 A My testimony is that the conclusions are
5 not true. The factual foundations of everything that
6 happened truthfully happened in my office. That's
7 true. The conclusions are not true because at the
8 time in 1995 when I made the declaration I had -- I
9 went through my file. What I had in my file was the
10 January 21st, 1993 letter from me to Britton
11 Sanderford and I had a letter of February 16th from
12 Erin Pierce to me, but I had nothing to show that I
13 had followed through and there was any follow-through
14 or any other matter after -- or even a telephone
15 conference in response to her letter of February 16th,
16 1993. And I don't recall having any telephone
17 conference. This document shows that a telephone
18 conference in fact happened, which I did not recall.
19 And this document shows that -- could I have the
20 document for a moment?

21 Q Sure.

22 MR. WOLBRETTE: We have an extra copy.

Page 19

1 that is Mike Eckstein, "when he," Mike Eckstein,
2 "called in, but I believe Mike told Shelly he would
3 call Dave tonight." I don't recall any telephone
4 conference from Mike Eckstein at that time. It looks
5 like if we don't make a decision today, the decision
6 will be made for us and the patent will go abandoned.

7 So this tells me that Axonn had in their
8 possession information, this document for one, that
9 the conclusions in my affidavit were incorrect when
10 these were made in April of 1995. And I was unaware
11 of this information, and two years later, because in
12 April 1995, this is two years after these events, I
13 did not have any other memory of what had happened at
14 that time.

15 BY MR. USDIN:

16 Q Now one thing that confused me in your
17 answer a little while ago, you said you were not aware
18 that these discussions were going on. But if you were
19 relying on this memo, it says "Dave is waiting" --
20 that's you, Dave, I assume. Wouldn't you assume that
21 to be you?

22 A Yes.

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1 MR. USDIN: Thank you.

2 THE WITNESS: This document shows first
3 that in response to her February 16th letter, that she
4 had a telephone conference. That's the first
5 statement that she makes.

6 Then down in the bottom paragraph, in the
7 last paragraph, this tells me that a decision was to
8 be made by Mike Eckstein as to whether it would be
9 more advantageous for us on the JA suit to let the
10 patent go unintentionally abandoned. This means that
11 they, Axonn was making a conscious decision of whether
12 to let this case go abandoned and that I did not know
13 that this was going on and these discussions were
14 happening in the Axonn case, in-house at the time.

15 Then she discusses further one of the
16 solutions to the problem. If we filed a disgruntled
17 employee affidavit, which I had advised on earlier in
18 the month, it needs to be in the Patent Office by this
19 Friday. Did Mike discuss this before he left. She is
20 sending this to Britton. So she is saying did Mike
21 discuss this with Britton Sanderford. She said "I
22 called Mike's office and had Shelly ask him." I guess

Page 20

1 Q -- "is waiting on Mike's decision as to
2 whether it would be more advantageous for us on the JA
3 suit to let the patent go unintentionally abandoned."
4 Now you can't do something on purpose and have it be
5 unintentional, can you, Mr. Newman?

6 A That's right. You can't do something
7 unintentional --

8 Q Is that --

9 MR. WOLBRETTE: Wait. Let him finish his
10 answer.

11 THE WITNESS: I would agree that you cannot
12 intentionally abandon something as unintentional. It
13 is either intentional or unintentional. I would agree
14 with that. And my advice to them was that the case
15 not go abandoned at all because it was not a -- it is
16 a consequence, not an option as I saw it at the time.
17 But they -- you don't let it intentionally go
18 abandoned and call it unintentional. At the time, for
19 whatever reason, with the James Arthur lawsuit and
20 with James Arthur not cooperating with them, they
21 had -- I had given them some advice on how to proceed
22 and the advice was basically several-fold. They could

Page 21

1 proceed under -- but all the procedures would require
 2 a statement, which I called the disgruntled employee
 3 affidavit, by setting forth the facts of surrounding
 4 support and the procedures I would have gone with.
 5 Procedures include going under Rule 47, Rule 183, or
 6 filing a continuation. But they wanted me not to
 7 proceed. They told me not to proceed in terms of, or
 8 did not want me to proceed as far as I know, making
 9 any representations that James Arthur was an inventor
 10 to my recollection.

11 BY MR. USDIN:

12 Q Now you said a lot of things in there.

13 A Yeah.

14 Q Did you advise them not to let the patent
 15 go abandoned?

16 A Yes.

17 Q You said that when? In a phone
 18 conversation?

19 A That was a telephone conference, yes.

20 Q When was that?

21 A There was a telephone conference with Mike
 22 Eckstein at least and there probably was a phone

Page 22

1 recollection refreshed in certain ways, what are you
 2 basing your recollection on today as we sit here of
 3 the conversation you say you had with Mike Eckstein?

4 A Oh, base.

5 Q Yeah. How do you remember that?

6 A How do I remember that?

7 Q Yeah.

8 A This document refreshes me that I was
 9 having discussions with Mike Eckstein.

10 Q You just told us a moment ago you didn't
 11 remember having a conversation with Mr. Eckstein.

12 MR. WOLBRETTE: No, counsel, he said he
 13 didn't remember having a telephone conversation.

14 MR. USDIN: No.

15 MR. WOLBRETTE: Yes. He said he didn't
 16 have a recollection of having a telephone conversation
 17 as described in this memorandum that Mike was going to
 18 call Dave later after this memorandum.

19 MR. USDIN: All right. And that's what he
 20 just pointed to when he was giving his answer that he
 21 had a conversation with Mr. Eckstein.

22 MR. WOLBRETTE: No, he didn't point to

Page 22

1 conference during this one with Erin which I don't
 2 recall. But the advice I would give to a person is
 3 not --

4 Q I'm not asking you that. I'm asking you
 5 the advice you did give.

6 A Yes.

7 Q I'm not asking you to assume anything. I'm
 8 asking you to tell me exactly what you told them and
 9 when.

10 A The best as I can recall, it was a
 11 telephone conference at least with Mike Eckstein that
 12 you don't want to let the case go abandoned.

13 Q And you told him that.

14 A As best as I can recall, yes.

15 Q What are you basing that recollection on
 16 right now, Mr. Newman?

17 A Mike Eckstein called me around the 10th or
 18 11th, about a week before, and asked me -- he didn't
 19 ask me -- he told me that they had been sued, Axonn
 20 had been sued by James Arthur.

21 Q What are you basing your recollection on
 22 today as you sit here, since you have now had your

Page 23

1 that.

2 THE WITNESS: No, that's not correct.

3 MR. USDIN: He pointed to that part of the
 4 page.

5 MR. WOLBRETTE: No, that's ridiculous.

6 MR. USDIN: Where is your finger now? At
 7 the bottom of the page.

8 MR. WOLBRETTE: Come on. That's
 9 preposterous.

10 THE WITNESS: I was not doing anything
 11 on --

12 (Reporter asked for order in the
 13 deposition.)

14 MR. USDIN: Let me ask the question.

15 MR. WOLBRETTE: I'm instructing you do not
 16 point at the document unless Mr. Usdin asks you to.
 17 He wants to interpret your pointing in some kind of
 18 way. Okay?

19 BY MR. USDIN:

20 Q How do you recall today as you sit here in
 21 this deposition under oath the conversation you had
 22 with Mr. Eckstein?

Page 25

1 A From this document.
 2 Q From what document?
 3 A The document of February 17th, 1993 from
 4 Erin Pierce.
 5 Q That's what refreshes your recollection
 6 that you did in fact have a conversation with
 7 Mr. Eckstein; is that right?
 8 A But not --
 9 Q Wait. Please answer my question.
 10 A This document assists me, yes.
 11 Q Was it before or after February 17, 1993?
 12 A It was before.
 13 Q What day was it?
 14 A On or around February 10th or 11th.
 15 Q How do you recall that it was on that day.
 16 A This document refreshes me to the extent
 17 that Mike Eckstein was involved in the decision
 18 process.
 19 Q Having seen this document for the first
 20 time in the last couple of days, is that when your
 21 memory got refreshed as to that conversation?
 22 A Yes.

Page 27

1 coming and going?
 2 A I just don't recall.
 3 Q Do you have any notes of your conversation
 4 with Mr. Eckstein?
 5 A I do not.
 6 Q Do you take notes of conversations you have
 7 with clients or outside attorneys?
 8 A Yes.
 9 Q And what do you do with those notes?
 10 A After I'm done dealing with whatever has to
 11 be done with the notes they are destroyed.
 12 Q And what do you mean after you are done?
 13 A Well, whatever has to be taken, whatever
 14 action, whatever notes, whatever I'm asked to do,
 15 those usually, eventually the notes are discarded.
 16 Q Well, for a patent that goes abandoned,
 17 when do you discard those?
 18 A After -- I just don't recall.
 19 Q What is your process for doing that? Do
 20 you personally go through a file and destroy
 21 documents?
 22 A We don't destroy documents, but we don't

Page 26

1 Q Tell me exactly what you told Mr. Eckstein
 2 that you can recall here today.
 3 A The best of my recollection, that you don't
 4 intentionally let a case go abandoned. And we
 5 discussed the disgruntled employee affidavit and we
 6 discussed getting James Arthur's signature on the
 7 declaration that was prepared and he said he would get
 8 back to me.
 9 Q And did he?
 10 A I don't recall.
 11 Q Did you call him back before the 18th?
 12 A I don't recall.
 13 Q Did you write to Mr. Eckstein at any time
 14 or to anyone at Axonn at any time about the actions
 15 that should be taken by February 18th as a result of
 16 the conversation you had with Mr. Eckstein?
 17 A Well, they all knew what action needed to
 18 be taken so there was no need to write at that time.
 19 Q So then the 18th came and went and no
 20 action was taken; right?
 21 A That's correct.
 22 Q Did you have any concerns about that date

Page 28

1 keep the scrap notes in the files normally.
 2 Q But if you have notes of a conversation in
 3 which you were advising a client not to let a patent
 4 go abandoned eight days before the abandonment date,
 5 do you keep those notes?
 6 A I would keep those notes if I could find
 7 them.
 8 Q Do you know where those notes are?
 9 A I have no idea.
 10 Q Have you searched for those notes?
 11 A Yes.
 12 Q Where have you searched?
 13 A We searched all the files.
 14 Q How many files do you have?
 15 A I don't know.
 16 Q Ten? A hundred? Five hundred?
 17 A We searched all the Axonn files, let me
 18 clarify.
 19 Q How many Axonn files do you have?
 20 A Whatever cases were pending. The Cargill
 21 case. This case. Whatever case. I think the
 22 Sanconix case also, which was part of the Axonn files.

Page 29

1 Q What is Sanconix?

2 A That is another company of Axonn belonging
3 to Britton Sanderford.

4 Q Did you search any other files to look for
5 these notes?

6 A Outside of Axonn's files?

7 Q Yes.

8 A No.

9 Q How many other files do you have in your
10 office?

11 A I don't know.

12 Q You can't tell me within a hundred?

13 A Oh, probably over a thousand.

14 Q In February of 1992 how many files did you
15 have in the office approximately?

16 A I don't know.

17 Q A hundred?

18 A No. Probably in the vicinity of a
19 thousand. Guessing. This is a guesstimate. Maybe
20 more.

21 Q Did you have any communications with
22 Britton Sanderford in late January, first half of

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1 February regarding the potential abandonment of the
2 patent?

3 A I had communication with Britton Sanderford
4 and Mike Eckstein around February 1st, 1993.

5 Q How do you recall that?

6 A That was because that was a long telephone
7 call, very long telephone conference.

8 Q What was the subject of that, the main
9 subject of that telephone call?

10 A The James Arthur matter. They wanted to
11 get his signature. That was the main subject. And
12 the secondary subject was to retain our services for
13 the Cargill litigation.

14 Q In that conversation did the February 18th
15 filing come up?

16 A I'm sure it did, yes.

17 Q Do you recall it coming up, Mr. Newman?

18 A I just don't recall much more than a
19 telephone conference right at this time. I recall
20 that we had, we discussed about the disgruntled
21 employee and the options because they told me that
22 James Arthur wouldn't cooperate or they had not been

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1 able to get cooperation of James Arthur's signature.
2 And I suggested that we have a factual statement under
3 oath by Britton Sanderford setting forth the
4 circumstances and I called that a disgruntled employee
5 affidavit which I was going to use in support for a
6 Rule 47 procedure.

7 Q What was the conclusion on that?

8 A They told me not to proceed. They did not
9 want me to do that at the time.

10 Q And what did you tell them would happen if
11 they did not do that?

12 A As a consequence the case would go
13 abandoned.

14 Q You told them that.

15 A Yes.

16 Q Did you confirm that in writing?

17 A I did not.

18 Q Did you take notes of that conversation?

19 A I don't recall.

20 Q Would that have been your normal course to
21 have a lengthy telephone conversation with a client in
22 which you were discussing the potential abandonment of

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1 a patent and to not take notes?

2 A Well, one -- it's possible, because we
3 don't take a lot of notes all the time.

4 Q So you may not have notes of any of the
5 conversations?

6 A I may not have any notes.

7 Q How do you recall that so clearly now,
8 Mr. Newman?

9 A These documents that are refreshing my
10 memory are refreshing the details of what happened
11 back in February of 1993. They responded that they
12 would take care of getting James Arthur's signature is
13 my recollection and that I was not to proceed with a
14 declaration or any other procedure at that time.

15 Q Did they say why?

16 A No.

17 Q As it got closer to February 18th did you
18 contact them again to inform them that you needed the
19 affidavit by the 18th or the patent would go
20 abandoned?

21 A I'm sure I have because it says here we had
22 a telephone conference. So we had one around the 17th

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1 or 16th, sometime around there.
 2 Q With Ms. Pierce.
 3 A Yes.
 4 Q Did you call her?
 5 A I don't recall.
 6 Q You don't have any recollection of doing
 7 that, do you?
 8 A I don't recall much of the telephone
 9 conference at all.
 10 Q Did you write to the client at any time in
 11 this February period advising them that the patent was
 12 going to go abandoned?
 13 A Well, I wrote them in January a letter
 14 telling them if we didn't respond by the 18th or 19th,
 15 I believe, in one month, it would go abandoned.
 16 Q Did you write them again?
 17 A I did not.
 18 Q Did you write them in February?
 19 A I don't recall. I don't think so.
 20 Q Have you seen any?
 21 A I have not seen any.
 22 Q And you have been through your records in

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1 want to proceed that way as far as I can recall, or
 2 they didn't authorize me to proceed on that route,
 3 didn't tell me.
 4 Q Even before they told you that, they hadn't
 5 told you to prepare a draft?
 6 A No. Not for them.
 7 Q For anyone?
 8 A Well, not for Axonn, right.
 9 Q Did you do it for someone else?
 10 A For this case?
 11 Q Yes.
 12 A No. Of course not.
 13 Q Well, I didn't know why you said not for
 14 them. I'm asking you the question.
 15 A Yeah. Your question was ambiguous.
 16 Q No, it wasn't. My question was clear. My
 17 question was did you prepare a draft to send to them
 18 at any time even before the conversation with them?
 19 And you said no, not for them. I'm asking you what
 20 you meant not for them.
 21 A Yeah, not for Axonn. No.
 22 Q At no time.

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1 connection with preparing for your deposition, haven't
 2 you?
 3 A Yes.
 4 Q You have been through all of them, haven't
 5 you?
 6 A As best as we can, yes.
 7 Q And you haven't seen any letter to that
 8 effect, have you?
 9 A That is correct.
 10 Q Did they tell you why they did not want to
 11 go the disgruntled employee route as you said it?
 12 A I don't recall.
 13 Q Did you suggest any other options to them
 14 as to how they could proceed?
 15 A Well, I don't recall any other options
 16 suggested. The options were every option suggested
 17 required making a statement that James Arthur was an
 18 inventor, and they didn't want me to take that
 19 procedure.
 20 Q Did you prepare any drafts of that type of
 21 procedure to send to them for their consideration?
 22 A Well, no, because they told me they didn't

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1 A And not for any other -- I did not prepare
 2 a draft for this case for anybody else.
 3 Q Why would you have prepared a draft for
 4 Axonn for anyone else?
 5 A I don't know why. I wouldn't.
 6 Q Did either Mr. Eckstein or Mr. Sanderford
 7 or anyone else at Axonn ever tell you to let the
 8 patent go abandoned?
 9 A I don't recall.
 10 Q You don't recall them telling you that?
 11 A No.
 12 Q Do you have any notes in your file that
 13 would tell you that they told you that?
 14 A We couldn't find any.
 15 Q Did anyone at Axonn ever tell you that they
 16 wanted the patent to go unintentionally abandoned?
 17 A I don't recall.
 18 Q Did you ever advise anyone at Axonn that
 19 the patent could go abandoned on purpose and that you
 20 would then file to revive it as being unintentionally
 21 abandoned?
 22 A No.

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1 Q So is it your testimony here today after
2 having been refreshed that Axonn was aware of the
3 February 18th deadline?

4 A February 19th deadline actually. 18th or
5 19th deadline, whichever.

6 Q Whichever, okay. Can we call it the
7 February deadline?

8 A Sure.

9 Q We will know what we are talking about?

10 A Yes.

11 Q Is it your testimony here today that you
12 were aware back in February of 1993 that Axonn was
13 aware that they had a filing deadline of February
14 1993?

15 A Based on this Pierce, this memo of Erin
16 Pierce, I clearly was aware because this shows that I
17 was aware and they were aware, yeah.

18 Q So then you couldn't after that in good
19 conscious and in your duty of candor as a member of
20 the Patent Bar have filed any kind of petition to
21 revive based on it being unintentionally abandoned,
22 could you have?

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1 that's a judgment call, I believe.

2 Q But you just testified that you told them
3 about their other options and they chose not to take
4 those; right?

5 A I told them --

6 Q Isn't that correct?

7 A I testified the option that they had that
8 they did not want me to do was make a representation
9 that James Arthur was an inventor. And that
0 eliminated the options pretty much.

1 Q So they knew they had that option though.
2 That was an option they could have taken based on your
3 advice; right?

4 A Yes.

5 Q And they chose not to take that.

6 A They chose --

7 Q According to your testimony.

8 A Well, I don't know if they chose or not
9 chose it. I don't know what happened inside Axonn or
0 their decisions. You are asking me. I don't know
1 what their choices were or discussions in-house.

2 Q But according to you, they had awareness of

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1 A Well, was it intentionally abandoned or not
2 intentionally abandoned?

3 Q Just answer my question, please.

4 A I don't know that that's true. That if
5 it's -- reask the question because I don't understand
6 what you're asking.

7 Q Axonn was aware of the deadline; correct?

8 A Yes.

9 Q And it's your testimony here today that
10 they let that deadline pass.

11 A Yes.

12 Q With full knowledge of it.

13 A Yes.

14 Q And my question to you is you couldn't then
15 as a patent lawyer try to revive that on the basis of
16 an unintentional abandonment if that were true, could
17 you?

18 A If they -- if it went abandoned because
19 they were boxed in because they couldn't respond
20 because of the James Arthur lawsuit and the James
21 Arthur declaration couldn't be signed, is that an
22 intentional abandonment or not intentional? And

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1 that option; right?

2 A They were conscious of it, yes.

3 Q And they obviously did not exercise that
4 option. did they? They didn't instruct you to do
5 that. did they?

6 A Instruct me to do what?

7 Q Follow either the option of filing with
8 Mr. Arthur or without him.

9 A I don't recall getting any instructions on
10 that.

11 Can we take a break?

12 Q Yes.

13 (Brief recess.)

14 BY MR. USDIN:

15 Q Mr. Newman, is it your testimony here today
16 that you are recalling these February 11th and
17 February 1st conversations for the first time in the
18 last couple of days?

19 A I recall them the last couple of days, yes.

20 Q For the first time?

21 A First time from when?

22 Q From --

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1 A Oh, I may have recalled them sometime
2 between the last -- you are talking between now and
3 four years ago?
4 Q Yes.
5 A Oh, sometime in that time period I may have
6 recalled the conversations, I'm sure.
7 Q Do you recall that at all?
8 A No. I don't recall when.
9 Q Did you just become aware of those dates
10 for the first time in the last few days since they
11 happened?
12 A Since what happened?
13 Q Since the conversations happened. Since
14 the conversations took place.
15 A I can't say that because I may have been
16 aware of them at other times too. I just don't
17 recall. I may or may not. I just don't recall.
18 Q And you have no recollection, am I right,
19 of talking to Mike Eckstein around February 17th?
20 A I have no recollection.
21 Q Do you have any recollection of calling
22 him?

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1 produced to us in the litigation in the production of
2 your files?
3 A I don't think we have it.
4 Q Did you look for it?
5 A I don't think we -- yes. I don't think we
6 -- I have never seen this letter.
7 MR. WOLBRETTE: I can answer this. This
8 has nothing to do with these files you requested.
9 This has to do with Voyager. This is the Cargill
10 file. This is not this file.
11 THE WITNESS: That is correct. This letter
12 has to do with Voyager. It has nothing to do with the
13 wireless alarm patent.
14 BY MR. USDIN:
15 Q Didn't you just testify that at least in
16 some of your conversations with them around this time
17 period you were talking about more than just the
18 Cargill in the same conversation?
19 A That's possible. That's true. I remember
20 from the February 1st telephone conference.
21 Q So when you would speak to Mike Eckstein,
22 for example, you would speak to him not just about

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1 A No.
2 Q How about of him calling you?
3 A No.
4 Q I'm going to show you a document that will
5 be marked for identification as P-15. This document
6 bears Bates number AAX101057 from Erin Pierce to you
7 dated February 17th, 1993.
8 (The document referred to was
9 marked Plaintiff's Exhibit
10 No. 15 for identification.)
11 THE WITNESS: Yes.
12 BY MR. USDIN:
13 Q Do you recall receiving this letter?
14 A This letter, no, I do not.
15 Q It is addressed to you; correct?
16 A Yes.
17 Q Does the address appear to be correct to
18 you?
19 A Yes.
20 Q And the fax information?
21 A Yes.
22 Q Do you know why this document was not

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1 Cargill from time to time.
2 A May or may not, yes. That is correct.
3 MR. USDIN: So I guess I would ask then
4 that we make sure we have all the documents since
5 there apparently appears to be some overlap in
6 Mr. Newman's files.
7 MR. WOLBRETTE: Well, counsel, I don't
8 think this has anything to do with this lawsuit. This
9 letter talks about the Voyager suit. So I don't see
10 that this has anything to do with this. But you are
11 welcome, if you want to look through the files in the
12 Voyager suit, you can do that too.
13 MR. USDIN: The point is he has just said
14 that his recollection has been refreshed about what
15 happened based on a February 17th, 1993 memo that
16 includes references to potential calls by Michael
17 Eckstein. He has testified that he does not recall
18 Michael Eckstein calling him. This letter in the
19 first two sentences states, and I'm quoting, "I just
20 spoke with Mike Eckstein. It seems that he has been
21 trying to contact you for a while and you have not
22 returned his calls." Mr. Newman couldn't have known

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1 why he was calling if he didn't return the calls.

2 MR. WOLBRETTE: Counsel, your question to
3 him on which I broke in is why this had not been
4 produced. This was not produced because it wasn't in
5 the patent file that brings us here. It may well be
6 in the Voyager file. As I said, if you want to look
7 through the file, you are welcome to it. But you
8 didn't request anything from the Voyager file. But
9 you are perfectly welcome to do it if you want to look
10 through it. Or if you want us to look through it for
11 you, we would be happy to do that.

12 MR. USDIN: We are not knowledgeable nor
13 responsible for knowing how he keeps his files and
14 therefore how he is going to produce documents to you.

15 BY MR. USDIN:

16 Q For example, could there be notes of
17 conversations you had with Mr. Eckstein or
18 Mr. Sanderford that relate to this matter that would
19 be in the Cargill file?

20 A I don't know.

21 Q You haven't checked.

22 A I just don't recall.

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1 irrelevant.

2 Q Now the memo that you are referring to,
3 which I think is P-14; is that right?

4 A Right. I'm not pointing to anything other
5 than I'm holding it.

6 Q I didn't say you were. The memo that is
7 P-14 talks about Axonn and what their communications
8 were. Paragraph 48, does that not relate to what was
9 going on within your office?

10 A In part it relates to what was -- well, it
11 looks -- paragraph 48 relates to my concentration
12 being impaired and the pain and burning resulting from
13 medical treatment of the painful affliction in my feet
14 and to restore matters that were entered into docket
15 after January 15th, 1993. The date may, it may be --
16 as best as I can tell, the date is not in the docket
17 and is still not in the docket as of that time. So
18 the date itself is missing from the docket because in
19 the normal course of business that's a date we would
20 have in a docket system.

21 Q So you were not reminded of that date by
22 this docketing system according to this.

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1 Q Have you checked?

2 A I have -- no, I haven't looked through it.

3 Q Now going back to your declaration, you
4 testified that: paragraph 48 of your declaration was
5 the first paragraph that was false.

6 A I said incorrect.

7 Q Okay. That was incorrect. What about
8 paragraph 48 was incorrect?

9 A Well, this is a case where it says that
10 February 18th, 1993, the date for responding to
11 examiner's 1993 communication, was missed due to my
12 impaired concentration and also due to my loss of
13 support staff that would have otherwise assisted me to
14 reconstruct the data missing in the docket.

15 Well, the whole -- the concept that we
16 missed a date because of a docket and because of
17 impaired concentration and loss of support staff is
18 totally irrelevant. The date wasn't missed because
19 this memo shows, the Erin Pierce letter to Britton
20 Sanderford of February 17th, 1993 shows that they were
21 aware of this date. And so to say missing from
22 docket, whether it is missing or not is totally

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1 A I was not reminded of the date by my
2 docketing system.

3 Q According to this, you also missed the date
4 due to your impaired concentration; is that correct?

5 MR. WOLBRETTE: Is what correct? That it
6 says that or that is what happened?

7 MR. USDIN: That's what the document says.

8 THE WITNESS: Are you saying -- yes, that
9 is correct.

10 MR. USDIN: Okay.

11 MR. WOLBRETTE: You mean that's what the
12 document says.

13 THE WITNESS: Yeah. I'm confused. If you
14 are asking me if that's why or if that's what the
15 document says?

16 BY MR. USDIN:

17 Q I'm asking you first right now if that's
18 what the document says.

19 A That's what the document says, yes.

20 Q Okay. Do you have any knowledge today
21 that's been refreshed by anything that when February
22 18th came, you remembered that that was a due date?

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1 A I have no recollection.
2 Q Do you have any recollection today,
3 refreshed or otherwise --
4 A Other than the documents --
5 Q -- that you were aware --
6 MR. WOLBRETTE: Wait a minute.
7 THE WITNESS: Other than the documents that
8 we have just testified, no.
9 BY MR. USDIN:
10 Q I don't understand that. Let me ask you
11 the question again. Do you have any recollection
12 today that you were aware on February 18th that there
13 was a filing due?
14 A Do I have a recollection? I don't have a
15 recollection right now.
16 Q It didn't come up on your docket system,
17 did it?
18 A That's correct.
19 Q And your concentration was impaired at that
20 time; is that correct?
21 A That is correct.
22 Q So independent of whatever Axonn was

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1 it would have solved the problem because it was
2 questionable whether one could be filed at that time
3 because your question was was the patent application
4 pending or not in February of 1993 or did it go
5 abandoned in November of 1992.
6 Q So it already may have been abandoned no
7 matter what you filed in February; is that right?
8 A That's possible.
9 Q Did you on February 17th or February 18th
10 or February 19th, whatever the due date was, did you
11 make any attempt to contact anyone at Axonn, initiate
12 any contact with anyone at Axonn to tell them that if
13 they didn't do something, the patent was going to go
14 abandoned?
15 A I don't recall.
16 Q You don't have any recollection of that, do
17 you?
18 A That's correct.
19 Q In the conversations that you do recall now
20 having had with Mr. Eckstein and Mr. Sanderford and
21 Mr. Eckstein, what did you tell them would be the
22 consequences of the abandonment?

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1 thinking about, you can't testify here today that on
2 February 18th you were aware that a filing was due.
3 A That is correct.
4 Q Let's look at paragraph 55. I think that
5 was the next one that you had said you believed was
6 incorrect as of today. Is that right?
7 A I believe so, yes.
8 Q Tell me what is incorrect about paragraph
9 55.
10 A Well, provided I had the client's
11 permission and authority, I would have filed, I would
12 have called the client on February 18th to file a
13 continuation and that's the normal procedure I would
14 have done. I would not have filed it without their
15 authority. But I recognize now that that would not
16 have happened because the continuation would have
17 included a representation that James Arthur was an
18 inventor. This is inherent because you are refiling a
19 case stating he is the inventor. You are -- all it
20 does is extend time. It doesn't solve the problem of
21 getting James Arthur's signature. And it would not
22 have solved the problem, I think. I'm not sure that

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1 A If the case goes abandoned, your rights to
2 pursue the patent would be lost, if it's intentionally
3 abandoned.
4 Q You told them that.
5 A Yes.
6 Q And in which conversation was that?
7 A I don't recall.
8 Q Was it the one just with Mr. Eckstein or
9 was it the one with both of them?
10 A I don't recall.
11 Q Did you write them a letter confirming that
12 that would be the consequences of inaction?
13 A I can't find a letter. I can't find one in
14 the files at this time.
15 Q Do you have any recollection of writing
16 one?
17 A I don't recall.
18 Q Do you recall writing one?
19 A I don't recall.
20 Q Can you give me a yes or no on that? You
21 do or you do not recall writing such a letter?
22 A I don't recall writing such a letter.

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1 Q Okay. Based on your recollection as you
2 sit here today, was it your understanding back in
3 February 1993 that any abandonment by them would have
4 been intentional?

5 THE WITNESS: Could I have the question
6 read back, please? I understand abandonment --
7 because I'm trying to understand the question.
8 Please.

9 MR. USDIN: That's okay.

0 (The record was read by the reporter.)

1 MR. WOLBRETTE: Could I ask for
2 clarification? You are talking about abandonment
3 under the circumstances as they existed at that time,
4 not just any abandonment?

5 MR. USDIN: Yeah.

6 BY MR. USDIN:

7 Q What I'm trying to ask -- that question
8 wasn't the best -- what I'm trying to ask you here is
9 you now have a memory that you didn't previously have
0 you say of what went on in those days.

1 A That's correct.

2 Q Based on your current memory of what you

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1 many clients intentionally abandon the case, they just
2 don't want the case any more, then the case is clearly
3 unintentionally -- is clearly intentionally abandoned,
4 then you cannot revive the case. And as I recall now,
5 the issue was did these facts and circumstances force
6 Axonn into a position where they could not respond to
7 the office action because they could not get James
8 Arthur's signature. They could not or did not
9 authorize me to proceed with representations which I
0 would prepare, such as disgruntled employee
1 affidavits, to support procedures I would have taken
2 which would have represented James Arthur as an
3 inventor. And whether that put them into a situation
4 that it was an unintentional abandonment because they
5 didn't have a choice. Their hands were tied because
6 of the James Arthur litigation.

7 Q Did you advise Axonn or anyone related to
8 Axonn in February of 1993 that if the patent went
9 abandoned, it would be an unintentional abandonment
0 that could be revived?

1 A At any time in 1993.

2 Q In January or February of 1993.

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1 knew back in February of 1993, based on what you knew
2 in February 1993, would Axonn's abandonment, if there
3 had been one, have been intentional or unintentional?

4 A Base on my memory. Or not based on my
5 thoughts or analysis.

6 MR. WOLBRETTE: He wants to know if under
7 the circumstances as you now understand them whether
8 you told them it was an intentional abandonment or
9 whether they could file an application to revive it as
10 unintentional.

11 THE WITNESS: Is that the question?

12 MR. WOLBRETTE: That's basically the
13 question, what he is trying to get at.

14 BY MR. USDIN:

15 Q Go ahead and answer that.

16 A I don't recall right now. I cannot recall
17 at this time. I think that -- I just can't recall at
18 this time. Because the question -- I just don't
19 understand or recall the question at this point. What
20 I think the -- if the case was unintentional, the
21 abandonment, they could definitely revive the case.
22 If it was intentionally abandoned, because we have had

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1 A I don't recall.

2 Q You don't recall doing that, do you?

3 A I don't recall doing it.

4 Q Did you advise Axonn or anyone related to
5 Axonn at any time in January or February of 1993 that
6 under their circumstances, if they let the patent go
7 abandoned, it would be an intentional abandonment and
8 therefore could not be revived?

9 A I don't recall.

10 Q You don't recall doing that, do you?

11 A I don't recall. I do not recall.

12 Q You don't recall doing that, telling them
13 that?

14 A Telling them what?

15 Q That under the circumstances that they were
16 in, any abandonment would be intentional and could not
17 be revived.

18 A I don't recall that.

19 Q You don't recall doing that, do you?

20 A I don't recall doing that.

21 Q And you certainly never wrote them to that
22 effect, did you?

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1 A That is correct.

2 Q Is it your testimony that Axonn was opposed
3 to any kind of a filing that showed Arthur as an
4 inventor?

5 A From my recollection of 1993, yes.

6 Q Now there had already been a filing with
7 the U.S. PTO for this patent application that showed
8 Arthur as an inventor; correct?

9 A That is correct.

10 Q Did they explain to you why now they no
11 longer wanted to show Arthur as an inventor?

12 A In February, no.

13 Q At some other time?

14 A Yes.

15 Q When?

16 A In June of 1993.

17 Q What did they tell you in June of 1993?

18 A They wanted me to remove or asked if they
19 could remove Arthur's name as an inventor from all the
20 patents that were issued and including this, and this
21 patent application.

22 Q That was after the patent had already been

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1 declared abandoned; correct?

2 A Yes.

3 Q And you told them they couldn't do that;
4 correct?

5 A I told them they could not. I told them
6 based on my understanding from 1998 (sic), that Arthur
7 was a key inventor.

8 Q From?

9 A 1988. The reason I knew that was because
10 his name went first on the patent. So on the issued
11 patent you see Arthur's name. And Britton Sanderford
12 insisted that Arthur's name go first because he told
13 me in 1988 that Arthur was a key inventor. I thought
14 Arthur's name, it was my opinion Arthur's name could
15 not be removed from the patent as a co-inventor.

16 Q Now you also testified earlier that
17 paragraph 57 of your declaration was incorrect. Can
18 you tell me what in that paragraph is incorrect?

19 A Well, it's clear based on, I said based on
20 refreshing my memory, or not refreshing but seeing the
21 memo of Erin Pierce written February 17th, 1993 that
22 there was a consciousness of the date that I had, that

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1 I had a consciousness of the date and Axonn, Mike
2 Eckstein and Erin Pierce had a consciousness of the
3 date, and that therefore I think this is incorrect
4 because these people were aware of the date.

5 Q But it's those people as opposed to your
6 realization. The affidavit refers to your
7 realization; correct?

8 A Well, the affidavit --

9 Q Is that correct?

10 A The affidavit refers to my realization,
11 yes.

12 Q And that memo doesn't discuss what you were
13 aware of on February 18th or February 19th; correct?

14 A Well, that's not true.

15 Q Okay. What date is the memo that you are
16 relying on?

17 A February 17th, 1993.

18 Q Okay. It is true that your concentration
19 was impaired at this time; correct?

20 A That is correct.

21 Q So the memo that is dated February 17th, in
22 other words before the due date, whatever it was, the

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1 18th or the 19th, doesn't discuss what you happened to
2 be thinking of or aware of on the 18th or the 19th; is
3 that right?

4 A That is correct.

5 Q So really paragraph 57 could be accurate
6 for all you know today; is that right?

7 A It could -- it may be. It could be. It
8 could not be. I just now feel, seeing this, there is
9 more -- the bottom line, this was available to Axonn
10 when this affidavit was prepared. This affidavit and
11 draft was sent several times to Mr. Eckhard Kuesters
12 and it's clear after seeing bills that Axonn had a
13 chance, Mike Eckstein and Steve Fant at minimum had
14 chance to review this affidavit and make any
15 corrections to any inaccuracy in it. And no one when
16 this affidavit was prepared in 1995 brought to my
17 attention these set of facts to refresh my memory.
18 This is two years after it happened. So basically I
19 was fooled. I was fooled or snookered into making
20 statements which I believed at the time, in 1995, were
21 correct. But had there been cooperation from Axonn
22 and we had a discussion about what had happened, we

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1 could have reconstructed what happened and we would
2 have more accurate representations in here, in this
3 declaration.

4 Q Did you contact anyone from Axonn at the
5 time you were preparing your declaration?

6 A Yes.

7 Q Who?

8 A Eckhard Kuesters.

9 Q Anyone within the company?

10 A No.

11 Q Did you tell Mr. Kuesters at any time that
12 you had reviewed your file in connection with this
13 time period?

14 A Yes. And that's where I said the file
15 included January 21st and the February 16th letter
16 from Erin. That's all I had in my file. And I had
17 reviewed my file at that time.

18 Q Did you tell Mr. Kuesters what was in your
19 file?

20 A I don't recall.

21 Q You don't recall doing that, do you?

22 A I don't recall doing that.

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1 A He asked. No, he asked me what was going
2 on at that time in my life.

3 Q And you told him about the foot disease.

4 A Yes.

5 Q And you told him about the docketing
6 problem.

7 A I told him about the docketing, yes.

8 Q And that did happen; correct? The
9 docketing problem did happen; correct?

10 A Yes.

11 Q And your docketing system was erased;
12 correct?

13 A Yes.

14 Q And the docket entry for the Axonn response
15 of February 18th or 19th was deleted; correct?

16 A Well, it wasn't there. So the implication
17 is it was deleted, yes.

18 Q So it may not have been put in in the first
19 place.

20 A My belief is it was put in.

21 Q But you don't know that.

22 A I don't recall at this point.

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1 Q Did you tell Mr. Kuesters that you had no
2 memos or notes of any conversations with anyone at
3 that time?

4 A I don't recall.

5 Q So when Mr. Kuesters was doing this, he
6 wouldn't have been aware of what you looked at to
7 refresh your recollection; is that right?

8 Mr. Kuesters didn't know what you looked at in your
9 file?

10 A He didn't know what I had in my file,
11 that's true.

12 Q He didn't know whether you had notes of
13 conversations with anyone for that time period, did
14 he?

15 A That is true.

16 Q Mr. Kuesters didn't suggest to you that you
17 include in a declaration that you were suffering from
18 a debilitating foot disease, did he? He didn't know
19 that you had a debilitating foot disease, did he,
20 until you told him?

21 A I told him I had that.

22 Q You volunteered that?

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1 Q So it either wasn't put in or it was
2 deleted.

3 A That's correct.

4 Q So either way it did not appear on your
5 docketing system on February 18th or 19th; is that
6 correct?

7 A Yes.

8 Q And that's all true; correct?

9 A Yes.

10 Q And that is something volunteered to
11 Mr. Kuesters; correct?

12 A Yes.

13 Q He did not provide you with that
14 information, did he?

15 A That is correct.

16 Q When he asked you what was going on in your
17 life during that time period, this is what you came up
18 with; right?

19 A Yes.

20 Q And did he suggest to you that you review
21 your file?

22 A I did review my file. I can't recall if he

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1 suggested it or not, but I did.

2 Q Did you tell him after you reviewed your
3 file that your file was incomplete in any way?

4 A I wouldn't know what is missing if
5 something is missing. I assume my file is complete.

6 Q Even if it has no hand notes of any
7 conversations with anyone for the whole time period?

8 A It's typical we don't have a lot of hand
9 notes in any files for a lot of things because a lot
10 of times we just don't take notes.

11 Q But is it typical that you would have no
12 hand notes when there was a patent application that
13 was about to go abandoned?

14 A That's typical when everybody knows what's
15 going on.

16 Q And is it typical that there would be no
17 confirming letters to the client advising them that
18 unless they took certain actions the patent would go
19 abandoned?

20 A Yes. When everyone knows what is going on,
21 that would be typical, yes.

22 Q How would you make sure that everyone did

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1 know?

2 A Based on telephone conferences.

3 Q Wouldn't a prudent thing be to write them a
4 letter to make sure they understand what they were
5 about to give up?

6 MR. WOLBRETTE: Define prudent. What do
7 you mean by prudent?

8 BY MR. USDIN:

9 Q What do you understand prudent to mean?

10 MR. WOLBRETTE: No, you have used the word.
11 You tell him what you mean by the word.

12 MR. USDIN: I will withdraw the question.

13 BY MR. USDIN:

14 Q Do you know what prudent means?

15 A I don't know from your terms, no. I don't
16 know what it means to you.

17 Q You are a lawyer. You don't know what
18 prudent means; is that correct?

19 MR. WOLBRETTE: He said he didn't know what
20 it meant to you.

21 MR. USDIN: I want to make sure we have the
22 same definition.

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1 MR. WOLBRETTE: You are asking the
2 question. Why don't you tell him what you mean by
3 prudent.

4 BY MR. USDIN:

5 Q No, what do you understand prudent means?

6 MR. WOLBRETTE: They are going to play
7 games, David.

8 MR. USDIN: No, I'm going to be comfortable
9 with his definition, okay?

10 MR. WOLBRETTE: Fine.

11 BY MR. USDIN:

12 Q What do you understand prudent to mean so I
13 can make sure that you are comfortable with it.

14 A Reasonable.

15 Q Okay. Wouldn't the reasonable thing to
16 have done would be to write a letter to make sure
17 everybody understood what rights were going to be
18 given up?

19 A Now I wish I had written a letter, yes.
20 But it wasn't done at that time.

21 Q But your testimony right now is that you
22 are not sure even as you sit here today whether you

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1 understood whether it was going to be intentional or
2 unintentional; correct?

3 A That is correct.

4 Q And so there were two fairly different
5 consequences of whether it was intentional or
6 unintentional; correct?

7 A Yes.

8 Q Did you write them a letter telling them
9 those two dramatically different consequences in view
10 of the uncertainty in your own mind of what the
11 circumstances were?

12 A No.

13 Q Would that have been the reasonable thing
14 to do?

15 A Looking back, yes. At the time they were
16 advised of, everyone understood, clearly understood,
17 or appeared to understand. It didn't seem necessary.

18 Q What did they understand, Mr. Newman? Did
19 they understand their abandonment was going to be
20 intentional or unintentional?

21 A At this point I don't know because I don't
22 know their understanding.

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1 Q What was your understanding?
2 A I don't recall. In 1993, I don't recall.
3 Q That recollection has not been refreshed
4 from looking at any of this?
5 A I still can't tell from this. This looks
6 to me like they were in a bind. And they made a
7 decision, they had a conscious awareness of the
8 options and they made a decision.
9 Q And is that intentional or unintentional
10 abandonment that results from that decision?
11 A You know, I think more investigation has to
12 be done now to find out what was in their state of
13 mind at the time, because I don't know. The answer is
14 I think it's unintentional based on when they are
15 backed up against the wall. But they cannot proceed
16 freely on their own accord. That to me is
17 unintentional.
18 Q Did you ever make any filings with the PTO
19 that made that argument?
20 A I don't recall any filings that I have made
21 at this point. I just don't recall.
22 Q You also said that paragraph 58 I believe

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not have client authorization.
Q But when you say the conclusion is
incorrect, the conclusion you are referring to is the
conclusion that you would have timely submitted a
continuation patent application; is that correct?
A That's correct.
Q And you are saying now you would not have
done that.
A I wouldn't have done it without the client
authorization. And based on my recollection of what
happened in 1993, they did not, they Axonn did not
want me to proceed with representations that Arthur
was an inventor.
Q Did they ever state that in writing to you?
A I can't recall all the writings I have from
them. I don't know if I have that or not in the
records.
Q Well, you have looked through your files in
the last couple of days; correct?
A No, I haven't. Not in the last couple of
days.
Q Have you looked through your files in

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1 was incorrect.
2 A Yes.
3 Q Tell me what is incorrect about paragraph
4 58.
5 A This says "But for the impairment of my
6 concentration due to the unavoidable, extensive,
7 excruciating, continuous pain, discomfort and burning
8 I suffered in February 1993, due to the unavoidable
9 virus, and but for my docketing system collapsing due
10 to unavoidable loss of my support staff, impairment in
11 my concentration, and deletion of docket data by the
12 interviewee." Okay, that's all true. Those things
13 happened. But the conclusion, "I would have timely
14 submitted a continuation patent application on or
15 before the critical date of February 18th, 1993 and
16 the present application would not have been
17 abandoned," I think that conclusion is incorrect.
18 Q So the conclusion being that you would have
19 timely submitted a continuation --
20 A No. Because it is not that I would have
21 timely. I think the -- I would not have submitted
22 anything without the client's authorization, and I did

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1 connection with this litigation?
2 A Yes, I have.
3 Q And you have done that in the last couple
4 of months?
5 A Maybe the -- I reviewed some files on
6 Monday, Tuesday, Wednesday, yes.
7 Q Of this week.
8 A Yes.
9 Q And in that review of those files did you
10 see any letters to you from anyone at Axonn or anyone
11 associated with Axonn in which they told you they did
12 not want you to submit a continuation patent
13 application on or before February 18th, 1993?
14 A I don't recall any letter.
15 Q You don't recall seeing one, do you?
16 A Right.
17 Q Is it your testimony that the first time
18 you were aware that this declaration that you signed
19 under penalty of perjury and submitted to the Patent
20 Office, that the first time you were aware that there
21 were incorrect statements in it was in the last few
22 days?

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1 A Yes.
 2 Q Let's go back to a little background,
 3 Mr. Newman. After law school you went to work for the
 4 Finnegan law firm?
 5 A Yes.
 6 Q For two or three years?
 7 A About a year, year and a half maybe.
 8 Q Was that patent work?
 9 A Yes.
 10 Q All patent work?
 11 A Yes.
 12 Q Why did you leave?
 13 A I had an offer to work with the university
 14 full time.
 15 Q University? Which one?
 16 A George Washington University.
 17 Q So you left them of your own volition?
 18 A Yes.
 19 Q What were you teaching?
 20 A Electrical engineering.
 21 Q Did you teach any patent courses?
 22 A Eventually, yes.

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1 decrease and I would spend more time teaching. The
 2 first year I only had to teach one course per
 3 semester, so I had a lot of time the first year.
 4 Q And then in 1991 you started your own firm;
 5 correct?
 6 A Well, this is the firm, '85. It kind of
 7 grew. It was small doing general matters. It was a
 8 mixture of patent-- excuse me -- mixture of
 9 practicing law and a mixture of just general
 10 consulting.
 11 Q But in '91 you started full time I believe,
 12 didn't you?
 13 A Well, yes. I left the university in '91,
 14 that's correct.
 15 Q Okay. Go back if you would to that resume.
 16 Do you still have that? The firm's profile. I
 17 believe that's P-13. On pages four and five, does
 18 that accurately describe your professional licenses
 19 and affiliations?
 20 A At that time, yes.
 21 Q Have there been some that have been added?
 22 A Yes.

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1 Q When?
 2 A I don't recall exactly. It was either 1990
 3 or 1991. I'm not sure.
 4 Q While you were teaching, did you also
 5 practice law on the side?
 6 A Yes.
 7 Q Starting when?
 8 A 1985.
 9 Q '85?
 10 A Yes.
 11 Q What type of law were you practicing?
 12 A I had a general practice but included
 13 patent law.
 14 Q How much of your time were you practicing
 15 law while you were teaching full time?
 16 A I don't know. How do you quantify how
 17 much? In hours?
 18 Q Yes, hours per week let's say.
 19 A It would vary because in the summer you
 20 have a lot of free time so all of my people are
 21 working full time practicing law. When the teaching
 22 picks up, the weight of the law practice would

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1 Q Can you describe what those are?
 2 A Let's see what we have here.
 3 I have also been admitted to the Delaware
 4 Bar.
 5 Q Anything else?
 6 A There may be other associations that I have
 7 added, deleted, whichever, which has varied from what
 8 is on here now. Other professional associations, I
 9 probably varied that.
 10 Q All right. Anything on pages four and five
 11 that is not accurate?
 12 A Well, as of that time, that's what I was
 13 doing in terms of what I was doing. Because now some
 14 of these things are based on experiences at Finnegan,
 15 some at the CIA at some point. So depending on how
 16 you read it. It is meant to accurately reflect on my
 17 background, where I have been. The years are correct.
 18 The degrees look to be correct. The societies appear
 19 to be correct. Professor. I became a professor and
 20 lecturer in law at one point at George Washington
 21 University which is not on here now. One semester.
 22 There may be other things I have done professionally

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1 that are not listed here since that time. I just
2 don't know what they are.

3 Q Have you ever been the subject of any
4 professional disciplinary proceedings?

5 A Only on a matter that I have been told is
6 de minimis, or nothing. I have had one issue, yes.

7 Q What is that issue?

8 A I had a former associate after I sued him
9 file a complaint about five, six months later when he
10 couldn't get the lawsuit to settle.

11 Q Who was that?

12 A Anthony Natoi.

13 Q What was the lawsuit that was filed?

14 A Common law conversion and theft.

15 Q What was the basis of the lawsuit?

16 A He stole about 10 megabytes of documents
17 from our file when he left and I went after him for
18 it.

19 Q What happened in that lawsuit?

20 A We got a default in Maryland and then I
21 pursued him in New York. I have a judgment against
22 him now in New York and he is trying to fight it on an

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1 he couldn't get to settle the Maryland lawsuit.

2 Q What is the status of that disciplinary
3 proceeding?

4 A Well, the person at the Patent Office told
5 me, he said it was so unimportant they may not do
6 anything on it. He said what I was supposedly
7 characterized of doing, he said it was nothing wrong.
8 It was what he did in practice and there was nothing
9 he could see that I had done wrong. He said they are
10 just too busy with real matters such as grading Patent
11 Bar exams, it took them from August until roughly
12 March or April of this year to grade the exams from
13 last August, and he had other matters to go after.

14 Q When was the complaint or when was the
15 filing, the disciplinary filing?

16 A He filed it maybe around 1995.

17 Q And it's still pending then.

18 A Well, it's pending, to the extent it's
19 pending. They said they don't know if they will ever
20 get around to anything on it.

21 Q But it hasn't been dismissed.

22 A It hasn't been dismissed.

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1 appeal.

2 Q What was the disciplinary proceeding that
3 he filed?

4 A He filed in the Patent Office regarding
5 another client matter which is confidential to a
6 client. He didn't file a disciplinary proceeding. He
7 filed that there was something about some dates of
8 documents which he has which factually just his
9 statements were just totally wrong.

10 Q Could you explain? Without telling me who
11 the client is at this point.

12 A He made representations that certain dates
13 were dated, were backdated before a certain point in
14 time, which they were not. They were dated by a
15 client at a certain point in time as confirmatory of
16 what actually happened at this time. But he is trying
17 to say they happened before that date and made a bunch
18 of accusations about me having illegal stock in a
19 company which I never had any stock in whatsoever.
20 I'm trying to think of what other accusations. He
21 made a bunch of other -- they were all false
22 accusations. These were filed basically after, when

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1 Q And it hasn't been ruled in his favor,
2 either, correct?

3 A This is true.

4 Q So it's still open?

5 A Still an open matter.

6 Q Any other proceedings in the Patent
7 Office --

8 A No.

9 Q -- relating to you?

10 A No.

11 Q Any proceedings before any other
12 professional affiliations?

13 A No.

14 Q No other bar association proceedings?

15 A No.

16 Q Any other malpractice claims other than by
17 Axonn?

18 A No.

19 Q Never been.

20 A Never been.

21 Q Okay. When you take notes of a
22 conversation, Mr. Newman, do you put them in the file

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1 or send them to someone to put them in the file?

2 A I normally, if I take notes, they are put
3 in the out box. Then they are normally put in the
4 file. The file name is normally written on the notes.

5 Q Then someone such as Dawn Molvin will put
6 them in the file?

7 A That's correct.

8 Q That's one of her jobs?

9 A Yes.

10 Q And then if the matter is concluded, does
11 someone go back through that file and extract those
12 notes?

13 A It depends on the matter. In patent
14 applications generally that is true.

15 Q Patent, I'm sorry?

16 A When patent applications issue, we normally
17 clean the file.

18 Q What about when a patent application has
19 gone abandoned and the prosecution is continuing with
20 another attorney?

21 A Usually if there are notes in the file, the
22 notes are there.

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1 Q And in going back and reviewing the Axonn
2 files you found no such notes?

3 A I could not find any such notes.

4 Q Do you have any recollection of purging
5 that file of any documents?

6 A No.

7 Q By purging I mean taking any documents out
8 and throwing them away or destroying them?

9 A I do not.

10 Q Or instructing anyone to do it?

11 A No.

12 Q Do you keep a daily calendar?

13 A Well, the docket system docket things, if
14 that's what you are asking, yes.

15 Q But do you keep a calendar of what things
16 you do during the day?

17 A Do you mean for my time or whatever?

18 Q For your time or just tasks, a project
19 list.

20 A I make, I keep a list of things I'm working
21 on and then when they are done the paper is normally
22 thrown away. It is a list of priorities.

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1 Q Do you keep a book, a calendar book --

2 A No.

3 Q -- of your schedule?

4 A No, I do not. I rely on the docket system.

5 Q On the docket system?

6 A Yes.

7 Q What about when you are traveling?

8 A I take a sheet of whatever I have to have,
9 where I have to be, where I have to go.

10 Q Do you print it out from the docket system?

11 A Well, from the docket or I will create a
12 sheet of what I have to do when I travel.

13 Q If there are any legal memoranda that are
14 prepared relating to a particular application, is that
15 put in the file for the patent?

16 A Yes.

17 Q And that's not destroyed, is it?

18 A As far as I know, nothing is destroyed in
19 terms of a formal legal memorandum, that's correct.

20 Q What about any cases that might have been
21 reviewed?

22 A Those are normally not kept in the file.

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1 Q And your billing records are maintained for
2 how long?

3 A Five, six, seven years, that time frame.

4 MR. USDIN: I actually only have one of
5 these. These are the documents that you provided to
6 me yesterday. Do you have an extra set?

7 MS. MANNING: I brought Mr. Newman's file
8 copies so we would have extras.

9 MR. USDIN: But that's not one we can
10 attach. That's an original.

11 MS. MANNING: No. We will probably have to
12 get another copy to attach.

13 MR. USDIN: So this will be a document we
14 will mark as P-16.

15 (The document referred to was
16 marked Plaintiff's Exhibit
17 No. 16 for identification.)

18 MR. USDIN: These consist of documents that
19 were produced to us yesterday for the first time;
20 correct, counsel?

21 MS. MANNING: Yes.

22 MR. USDIN: And they are billing records.

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1 I count 19 pages. They are not Bates numbered yet.
2 But I guess the best way may be just to go ahead and
3 attach them as an exhibit to this.

4 MS. MANNING: I would like to do that. I
5 think that might be easier than trying to figure out
6 what the Bates number is. But I will try to do that
7 so they will be Bates numbered.

8 MR. USDIN: Okay, that's fine.

9 BY MR. USDIN:

10 Q Are these your billing records for the
11 abandoned patent?

12 A Yes.

13 Q And that's AXNN-15 is the number that was
14 used; is that correct?

15 A Yes.

16 Q Are these all of the billing records that
17 you have been able to locate that relate to that
18 abandoned patent?

19 A Yes.

20 Can I take a short break?

21 Q Sure.

22 (Brief recess.)

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1 Q And the billing period.

2 A Right.

3 Q So do you have any bills for AXNN-15 that
4 cover the period 1992 or 1993?

5 A So far as I know, we have produced all that
6 we have. Unless there is something else that Dawn
7 had. Dawn Molvin has to pull up the bills for me. I
8 don't know where they are kept.

9 MR. USDIN: I don't believe we have gotten
10 anything like that.

11 MS. MANNING: It's my understanding from
12 Ms. Molvin that she has searched for 1992 and has been
13 unable to locate the stored file of 1992 to date. We
14 are still looking for that one. 1993, I have looked
15 yesterday through a copy of all of the Axonn bills for
16 1993 and I did not see any that were designated
17 AXNN-15, and I will ask Ms. Molvin to search again.
18 But as best I can determine, there is nothing in 1993
19 that is designated for AXNN-15. There was work done
20 on that application in 1992 when the response to the
21 office action was filed. I have not seen bills to
22 match up to that work yet.

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1 BY MR. USDIN:

2 Q Would you get the bills before you?

3 A Okay.

4 Q Mr. Newman, in Exhibit P-16, let me ask you
5 to look at the second-to-last page. I'm a little
6 confused by this particular entry, this particular
7 page. It has a billing date of 1-31-94.

8 A Yes.

9 Q Correct?

10 A Yeah.

11 Q But under the date for professional
12 services rendered is 1-7-93. That also includes a
13 1-31-94 adjustment and a 1-18-94 payment.

14 A Okay.

15 Q Is the 1-7-93 date that appears a
16 typographical error?

17 A It must be. It must be a wrong computer
18 entry because this is before everything even happened.
19 It's impossible as of this date. It should have been
20 1-7-94.

21 Q Which corresponds to the billing date.

22 A And the billing period.

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1 MR. USDIN: And there was work done for
2 1993 as well.

3 MS. MANNING: Yes. And I did not see any
4 1993 bills.

5 MR. USDIN: I guess what I would ask is the
6 search include not only ones designated AXNN-15 but in
7 case they are misdesignated anything that would
8 include descriptions relating to what appears to be
9 the subject matter.

10 MS. MANNING: Fine.

11 BY MR. USDIN:

12 Q Do you maintain a copy of your malpractice
13 insurance policy?

14 A You mean retain one?

15 Q Do you have one?

16 A Yes.

17 Q Do you know why that wasn't produced?

18 MS. MANNING: The reason that was not
19 produced was we were seeking a certified copy from the
20 insurance company and I do not have that yet.

21 MR. USDIN: Well, again, we have been
22 asking for that for a long time and we haven't gotten

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1 any copy, certified or not. We would like to get that
2 sooner rather than later.

3 MR. WOLBRETTE: Well, if you want an
4 uncertified copy, we will give it to you.

5 MR. USDIN: Well, we want a copy. I don't
6 think it is an excuse not to produce. If he has one
7 in his files --

8 MR. WOLBRETTE: No, I'm happy to give you
9 an uncertified copy. Most people want the certified
10 copy because then it is clearly the correct one. But
11 we will give you whatever he has in the files.

12 MR. USDIN: But we are having some trouble
13 getting a certified one. That Kathy will admit.

14 MS. MANNING: Right.

15 MR. USDIN: Therefore, we don't want to
16 wait.

17 MR. WOLBRETTE: I understand. We would be
18 happy to give you that. I am sure we will give it to
19 you today. I shouldn't say I'm sure. I will say we
20 will try to give it to you today.

21 MS. MANNING: I will call Dawn on the next
22 break and see if we can do that.

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1 you have someone work on it with you?

2 A No. I was alone.

3 Q So you are the complete author of this
4 document.

5 A Yes.

6 Q And did you prepare it specifically for
7 Axonn or did you adapt it from something else you had
8 done?

9 A I prepared this specifically for Axonn.

10 Q And you charged them for that; correct?

11 A Yes.

12 Q And you charged them \$5,000, I believe?

13 A Yes.

14 Q Do you know how many hours it took you?

15 A I have no recollection.

16 Q Was this the first time you had prepared
17 any intellectual property law guidelines for anyone?

18 A As far as I can recall, yes.

19 Q Did you subsequently adapt this document
20 and provide it to any of your other clients?

21 A I don't recall.

22 Q You don't recall having done that?

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1 MR. USDIN: Fine.

2 BY MR. USDIN:

3 Q Mr. Newman, you were first retained by
4 Axonn in 1986; correct?

5 A Yes.

6 Q And that was in connection with preparing a
7 paper on intellectual property law guidelines;
8 correct?

9 A Yes.

10 Q I'm showing you a document that we will
11 mark for identification as P-17.

12 (The document referred to was
13 marked Plaintiff's Exhibit
14 No. 17 for identification.)

15 BY MS. USDIN:

16 Q Are these the guidelines that you prepared
17 and forwarded to Axonn on or about December 10th,
18 1986?

19 A Yes.

20 Q And you wrote this; is that right?

21 A Yes.

22 Q I mean did you write the whole thing or did

Page 92

1 A I don't recall having done that, no. I may
2 have, I just don't know.

3 Q What was your understanding of why Axonn
4 requested these? What did they tell you?

5 A They asked me for advice on protection of
6 their intellectual property and this was the
7 guidelines I prepared in response to their request.

8 Q They wanted information about intellectual
9 property rights they had?

10 A Yes.

11 Q Was it your understanding that they lacked
12 that knowledge prior to that time?

13 A Yes.

14 Q And this was just intended to be an
15 overview; is that right?

16 A Yes.

17 Q Did they tell you whether or not they had
18 any intellectual property lawyer at that time either
19 on staff or on retainer?

20 A I don't recall.

21 Q At that time do you know whether or not
22 Mr. Eckstein was working with Axonn?

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1 A I don't recall.
2 Q At the time you did this if I recall your
3 chronology right you were practicing part time and
4 still teaching; right?
5 A That is correct.
6 Q In 1986.
7 A Yes.
8 Q Okay. And in 1988 they retained you to
9 prosecute some patent applications; right?
0 A That is correct.
1 Q At that time you were still a part-time
2 practitioner?
3 A Yes.
4 Q Still teaching?
5 A Yes.
6 Q And you filed the mother patent; is that
7 right?
8 A Yes.
9 Q That was beginning in '88, I believe?
0 A Yes.
1 Q And that continued through December 21st of
2 1990?

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1 A Yes.
2 Q Is that the official termination of your
3 representation relating to these patents?
4 A Yes.
5 Q But it had been transitioning before that
6 time?
7 A It seems to me it was a couple of weeks
8 before. But yes. The answer is yes, it was being
9 transferred. On or around that time is the best
0 estimate.
1 Q That date is about right then for the
2 ultimate transition; correct?
3 A Yes.
4 Q And these files were transferred to what
5 Mr. Sanderford calls a local firm.
6 A Yes, that is correct.
7 (The document referred to was
8 marked Plaintiff's Exhibit
9 No. 19 for identification.)
0 BY MR. USDIN:
1 Q They were being handled by an attorney
2 named Joseph Regaud?

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1 A Yes.
2 Q And at that point they transferred the
3 files to a firm in the New Orleans area; correct?
4 A Actually, I think it happened maybe in
5 November. Maybe a little bit before that time. Yes.
6 I'm not sure. My recollection is kind of old, but
7 it's about that time.
8 Q Back up a second. Let me show you a
9 document that we will mark for identification as P-18.
10 That's just the correspondence relating to the filing
11 of the mother patent; correct?
12 A Yes.
13 Q And that's your signature on the second
14 page; correct?
15 A Yes.
16 (The document referred to was
17 marked Plaintiff's Exhibit
18 No. 18 for identification.)
19 BY MR. USDIN:
20 Q P-19 is a document dated December 21st,
21 1990 bearing Bates number AAX100529 from
22 Mr. Sanderford to you.

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1 A Based on this letter to me, yes.
2 Q Showing you a document that we will mark
3 for identification as P-20, bearing Bates number N209,
4 does that refresh your recollection that Mr. Regaud
5 was handling matters?
6 A Yes.
7 Q And this related to the divisional
8 application that is the abandoned patent we are
9 dealing with in this litigation; correct?
10 A I can't -- I would have to check on the
11 serial numbers. I'm not sure which one this is right
12 now.
13 Q The divisional application for the
14 abandoned patent was filed by Mr. Regaud, correct,
15 originally?
16 A Yes.
17 MR. USDIN: This document, by the way,
18 bears a Bates number starting with N, which, counsel,
19 I believe we can agree means it was produced from your
20 records.
21 MS. MANNING: Yes.
22 (The document referred to was

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1 marked Plaintiff's Exhibit
2 No. 20 for identification.)

3 BY MR. USDIN:

4 Q And eventually responsibility for
5 prosecution of the divisional application that was
6 ultimately abandoned was transferred to you; correct?

7 A That is correct.

8 Q Showing you a document we have marked for
9 identification as P-21, bearings Bates number N482,
10 this is your substitution of power of attorney?

11 A Yes.

12 Q And you are becoming the attorney who
13 handles it in the Patent Office by virtue of this
14 document; correct?

15 A Correct.

16 Q That is the significance of this document?

17 A Yes.

18 Q And up at the top it says "Attorney Docket:
19 AXNN-15"; correct?

20 A Yes.

21 Q And that is the abandoned patent; correct?

22 A Yes.

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1 the Patent Bar and can practice before the Patent
2 Office but is not permitted to practice before a state
3 bar.

4 Q So he was an attorney by training at least
5 through education --

6 A Yeah.

7 Q -- but had not passed the state bar.

8 A Well, he passed it during that time. But I
9 don't think they admitted him. I don't know when he
10 got admitted.

11 Q You hired Mr. Natoli?

12 A Yes.

13 Q And when you hired him you believed he was
14 competent?

15 A Yes.

16 Q While he worked for you did you continue to
17 believe he was competent?

18 A Yes.

19 Q Throughout the entire time he was there?

20 A I believed it while he was there, yes. I
21 relied on him.

22 Q Did you supervise Mr. Natoli?

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1 Q And by virtue of this you became
2 responsible as the attorney prosecuting this patent.

3 A That is correct.

4 (The document referred to was
5 marked Plaintiff's Exhibit
6 No. 21 for identification.)

7 BY MR. USDIN:

8 Q You also had at that time in your office
9 someone who was assisting you named Joseph Natoli?

10 A Anthony Natoli.

11 Q I'm sorry, Anthony Natoli.

12 A Yes.

13 Q And he worked for you?

14 A Yes.

15 Q How long did Mr. Natoli work for you?

16 A Approximately a little over a year.

17 Q And was he an attorney?

18 A He was a clerk when he left, but he had
19 just passed the New York Bar, but he was a patent
20 agent at the time.

21 Q What is a patent agent?

22 A A patent agent is a person who has passed

Page 100

1 A Yes.

2 Q He was young I take it, huh?

3 A Yes.

4 Q How old was he?

5 A About 26, 27.

6 Q He was right out of law school?

7 A Yes.

8 Q But he had already taken the Patent Bar.
9 Right after law school he took the Patent Bar.

10 A He may have, but he took it again in the
11 summer of 1992.

12 Q When did he get out of law school, do you
13 know?

14 A I'm not sure. It was 1990 or 1991.

15 Q Why had he not been admitted to any bars
16 yet, do you know?

17 A He had not passed any.

18 Q He had tried?

19 A He had tried.

20 Q What bar had he attempted to pass?

21 A The New York Bar and I believe also the
22 Patent Bar.

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1 Q Had he failed both of those?
2 A To my recollection, yes. I'm not sure, but
3 I believe so.

4 Q How many times had he failed each of those?
5 A I don't know.

6 Q In the fall of 1992 was he admitted to
7 practice before any state bar associations?

8 A No.

9 Q So at that point he had still not passed
10 any bar exams.

11 A I think he got notification in the fall of
12 1992 he passed the New York Bar.

13 Q Was that in December 1992 though?

14 A November, December, I'm not sure. Sometime
15 like that. 1992.

16 Q He handled some of the prosecution of
17 AXNN-15; correct?

18 A Yes.

19 Q And he received notice that he had passed
20 the bar after he had done some work on that?

21 A You are asking the New York Bar. Yes.

22 Q Well, I'm asking any bar.

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1 lie to you about that, can you?

2 A No.

3 Q I can't either. And he also told you that
4 he had taken the New York Bar and had not passed that
5 at some point; correct?

6 A My memory serves me, yes. The answer is
7 yes. I may be faulty, but I think that's correct.
8 Because I believe he was out of law school at least as
9 of, what is it, May or June of -- you usually graduate
10 in May or June, so May or June 1991. And he was
11 interviewed in my office late summer or early fall,
12 mid fall 1991. And I believe he came on board around
13 December of 1991. So I assume in a normal course he
14 probably graduated law school around May or June of
15 1991, but I don't recall. I'm sure I had a bio or
16 resume on him at some point.

17 Q Did you have any concerns about his
18 competence based on the fact that he had failed the
19 bar exam?

20 A Well, when he started -- at what point in
21 time? Because he had no experience whatsoever
22 practicing law when he started in my office. This was

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1 A Well, the Patent Bar was before that time.

2 Q When did he pass the Patent Bar?

3 A My recollection serves me the summer of
4 1992, but I don't recall a particular month.

5 Q Did he pass the Patent Bar the first time
6 he had taken it?

7 A My recollection from what he told me, no.

8 Q He did not.

9 A That is correct.

10 Q Did he pass it the second time?

11 A Well, I don't know if this was the second
12 time, but he passed it in the 1992 time.

13 Q So it could have been the third time. You
14 just don't know.

15 A It could have been, yes.

16 Q But you know it was not the first.

17 A No.

18 Q You do know that.

19 A Well, I don't know that in fact, but I know
20 he just represented to me he didn't pass the Patent
21 Bar the first time.

22 Q You can't think of any reason why he would

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1 his first experience. And I spent that year basically
2 training him. I taught him how to do the patent law
3 practice. Based on the experience and training I had
4 given, he passed the Patent Bar.

5 Q What year did you spend training him?

6 A It would be 1992.

7 Q And that was the year he passed the Patent
8 Bar; correct?

9 A Yeah. He passed it that summer. I think
10 it was the summer. Usually it was given like April,
11 May, June, something like that.

12 Q When does notification that you passed come
13 out?

14 A I don't know for a fact, but I know back
15 when I took it it was about two months later. Now it
16 is about eight months.

17 Q So sometime in the late summer or early
18 fall he found out he had passed the Patent Bar.

19 A Correct.

20 Q Did you have any concerns about his
21 competence by virtue of the fact that he had failed
22 the Patent Bar once and had not yet passed a state bar

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1 exam as of the fall of 1992?

2 A In terms of competence, I knew that he
3 wasn't competent in the sense that he had no
4 experience and that he needed experience. And that's
5 what he got working on a lot of cases in my office
6 during 1992.

7 Q How did you supervise him?

8 A He was given projects to work on, either a
9 patent application or amendments or whatever had to be
10 done, office actions to respond to, and he would
11 prepare responses. I would review them, whatever he
12 prepared, and make corrections, changes, whatever had
13 to be done. And it was an iterative process like that
14 over the years.

15 Q That lasted through all of 1992?

16 A Yes.

17 Q You continued to supervise him that way
18 through the fall of 1992; correct?

19 A Well, less, because by the time he had
20 passed the bar he had become pretty much -- he had
21 gotten a certain level of competency and he could
22 handle certain matters himself.

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1 N000470. It is an appointment of associate agent of
2 Anthony Natoli; is that correct?

3 A Yes.

4 Q And in fact you signed that, the
5 appointment of him as the associate agent; is that
6 correct?

7 A That's correct.

8 Q That's because you remained the primary
9 agent; is that correct?

10 A That is correct.

11 Q And so you maintained primary
12 responsibility for prosecution of this file.

13 A That is correct.

14 Q And Mr. Natoli at all times in any work he
15 was doing on AXNN-15 was working for you?

16 A That is correct.

17 Q Under your supervision?

18 A To the extent I was supervising him at that
19 time, that is correct.

20 Q But you were responsible.

21 A I was responsible.

22 Q You mentioned a trial that you were

Page 105

1 Q What matters?

2 A Such as office actions. He had shown he
3 could draft some patent applications, I believe. So
4 he had a certain level of skill. I had him calibrate
5 a certain level of skill level if you will.

6 Q Did you continue, though, to review his
7 work through the fall of 1992?

8 A It depended on the case, because I was tied
9 up in another matter in the fall of 1992. I had a
10 trial and I think around October or November, in that
11 time, October, November, December, I was very much
12 committed to a trial and my review, if any, was
13 minimal.

14 Q So in October and November your review of
15 his work was minimal; is that correct?

16 A Right. Correct.

17 Q Now when you took over the prosecution of
18 AXNN-15, you also had him appointed as an associate
19 agent; right?

20 A That is correct.

21 Q I'm showing you a document we have marked
22 for identification as P-22. This bears Bates number

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1 involved in. Where was that trial pending?

2 A San Jose, California.

3 Q It required you to be out of town?

4 A Yes.

5 Q And you are aware that there was an office
6 action due in early November 1992 relating to AXNN-15.
7 correct?

8 A At what point in time? During the trial?

9 Q When you substituted as power of attorney
10 you were aware that there was a pending office action.

11 A Yes.

12 Q And when you substituted as power of
13 attorney you were aware that a response to that office
14 action was due in early November of 1992.

15 A That is correct.

16 Q By the way, when you substituted as power
17 of attorney in September of 1992, were you already in
18 that trial?

19 A It wasn't a trial. I mean the trial didn't
20 start until December. But we were busy preparing for
21 trial.

22 Q And you knew when you substituted as power

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1 of attorney that you were going to be busy I take it
 2 working on the trial.
 3 A Yes.
 4 Q Did you tell Axonn that you were going to
 5 be out of pocket for much of the fall?
 6 A I don't recall if I did or didn't.
 7 Q Did you tell Axonn that you were going to
 8 be largely unavailable in the fall of 1992?
 9 A I don't recall.
 10 Q But you were aware that there was a
 11 response to the office action due in November of 1992.
 12 A That was given to Anthony Natoli. Yes.
 13 Q But you were aware of that though at the
 14 time?
 15 A At some point I was aware of that, yes.
 16 Q Some point before November; correct?
 17 A Yes.
 18 Q And Mr. Natoli was given responsibility for
 19 preparing the response?
 20 A Yes.
 21 Q But again you were responsible for it;
 22 correct?

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You understand that's what I meant?
 A Correct.
 Q And you don't recall when you were aware of
 that?
 A I don't recall now being aware if I was or
 was not aware, that's correct.
 Q Do you have any recollection of conducting
 any supervision or oversight of the November response
 to the office action?
 A I don't recall.
 Q Is there anything in your files that
 suggests to you that you did?
 A Nothing -- I can't recall right now
 anything in my files that would refresh my memory.
 Q Do you have any recollection of having any
 discussions with Mr. Natoli before the November filing
 of alternative routes that could be taken if they did
 not have affidavits executed by all of the inventors?
 A I don't recall.
 Q And you don't have any knowledge that
 Mr. Natoli had any discussions with anyone at Axonn
 regarding what filings they could make with the Patent

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1 A Yes.
 2 Q Did you review it before it was filed?
 3 A I don't recall.
 4 Q You have no recollection of that?
 5 A No.
 6 Q Do you recall any discussions with
 7 Mr. Natoli about the filing?
 8 A I just don't recall right now.
 9 Q Do you recall reviewing any drafts of the
 10 response to the office action that was due in November
 11 of 1992?
 12 A No, I don't recall.
 13 Q Do you recall being aware that the response
 14 to the office action was not going to include all
 15 three inventors?
 16 A I just don't recall at this point.
 17 MR. WOLBRETTE: Let me ask, not include the
 18 affidavit of all three.
 19 MR. USDIN: Yes, thank you.
 20 THE WITNESS: I don't recall right now.
 21 BY MR. USDIN:
 22 Q He is correct. His correction is correct.

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1 Office in the event they did not have declarations
 2 filed by all three inventors.
 3 A I don't have any knowledge of that.
 4 Q You don't know that any of those
 5 discussions took place, do you?
 6 A I don't know if they did take place or did
 7 not take place.
 8 Q You don't have any recollection of
 9 suggesting to Mr. Natoli that those conversations take
 10 place, do you?
 11 A I don't recall that.
 12 Q You haven't seen any letters that talked
 13 about any options, have you?
 14 A I don't recall.
 15 Q You don't recall seeing any?
 16 A I don't recall seeing any, that's correct.
 17 Q Do you recall any participation you had in
 18 the preparation of the November 1992 response?
 19 A I don't recall.
 20 Q You don't have any recollection?
 21 A I don't have any recollection.
 22 Q And that's after having looked through your

Page 113

1 file, that didn't refresh any recollection?

2 A No.

3 (The document referred to was
4 marked Plaintiff's Exhibit
5 No. 22 for identification.)

6 BY MR. USDIN:

7 Q Showing you a document that's marked for
8 identification as P-23, it bears Bates number N000156
9 and is a letter to Erin Pierce, October 20th, 1992,
10 from Mr. Natoli, with an attachment. Do you have any
11 recollection of ever having seen this? For the
12 record, it is on the letterhead of David Newman and
13 Associates, P.C.

14 A I recall seeing the amendment as filed in
15 the patent application, but I don't recall seeing the
16 draft.

17 Q You don't recall seeing the draft on or
18 around the time this was sent.

19 A No.

20 (The document referred to was
21 marked Plaintiff's Exhibit
22 No. 23 for identification.)

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1 Q But you don't have any recollection as you
2 sit here today of having seen it one way or the other
3 back then?

4 A That is correct.

5 (The documents referred to were
6 marked Plaintiff's Exhibits No.
7 24 and 25 for identification.)

8 BY MR. USDIN:

9 Q And the response that was filed on or about
10 November 5th, 1992 to the pending office action was
11 rejected; correct?

12 A Correct.

13 Q By the Patent Office?

14 A Yes.

15 Q I'm showing you a document that we will
16 mark for identification as P-26.

17 MR. WOLBRETTE: You said rejected. What do
18 you mean? I'm not sure I understand what you mean by
19 rejected.

20 BY MR. USDIN:

21 Q Did you understand what I meant?

22 A We got an office action. It required -- it

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1 BY MR. USDIN:

2 Q I'm showing you a document marked for
3 identification as P-24 and then P-25. P-24 is Bates
4 number N000153. It is a letter dated November 4th,
5 1992 from Mr. Natoli to Erin enclosing a copy of the
6 amendment filed. P-25 is a copy of that amendment
7 starting with Bates number N001305. Do you recall
8 seeing this around November 1992?

9 A I don't recall.

10 Q Do you recall either on the date of the
11 filing or immediately after that having any
12 discussions with Mr. Natoli relating to the fact that
13 they did not have declarations from all three
14 inventors in the amendment that they submitted?

15 A I just don't recall.

16 Q I think you testified that you did at some
17 point recall seeing the actual amendment; right?

18 A Yeah. Well, I have seen it out of the file
19 history, yeah.

20 Q You mean in reviewing the file for the
21 deposition you have seen it now?

22 A Yes.

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1 came back asking for the affidavits or declarations
2 that were missing.

3 Q It was determined to be informal or
4 nonresponsive; right?

5 A I would have to see what it says.

6 MR. USDIN: Show him the document.

7 MR. WOLBRETTE: My problem is I think the
8 office action required a number of things to be
9 supplied, and the question is not clear. It has only
10 talked about one of many things. If you are talking
11 about that one thing, that's fine.

12 THE WITNESS: It says informal,
13 nonresponsive, yes.

14 BY MR. USDIN:

15 Q And then it says for the reasons checked
16 below, and the one that's checked is other; correct?

17 A Correct.

18 Q Could you read into the record, please,
19 what that reason was?

20 A "The inventors' affidavit or declaration
21 has not been supplied."

22 Q Just so it's clear, inventors' is

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1 apostrophe affidavit; right?

2 A Right.

3 Q Inventors', plural, affidavit or

4 declaration. Then it says "See p. 2 of the 5-7-92

5 action"; correct?

6 A Correct.

7 Q And this was an office action; correct?

8 A Yes. That's an office action.

9 Q And it was a decision by the examiner that

10 the response was inadequate; correct?

11 A No, he says informal.

12 Q Informal, nonresponsive; right?

13 A Slash nonresponsive, for the reasons set

14 forth below.

15 Q Is it your understanding then that the

16 November 5th, 1992 response was acceptable to the

17 Patent Office?

18 A Reviewing it now?

19 Q Yeah.

20 A Yeah. Because he answered on -- all the

21 issues that were raised by the examiner were responded

22 to. The issues raised by the examiner in the office

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1 go forward, did it?

2 A Well, this gave us 30 days or one month.

3 Q In which to do something more if you wished

4 to continue to prosecute the patent; correct?

5 A That is correct.

6 Q If you didn't do that something more, then

7 the patent couldn't continue to be prosecuted;

8 correct?

9 A Yes. After February 19th, 1993. That is

10 correct.

11 Q So as far as the Patent Office was

12 concerned, the November 5th, 1992 filing did not

13 include everything that they wanted to have in it;

14 correct?

15 A It did not. They wanted the affidavit

16 which was not included. But was it responsive? Yes,

17 because it addressed the issue that the affidavit or

18 declaration was missing. That issue was addressed in

19 the amendment.

20 Q But as far as the Patent Office was

21 concerned, it was not complete because that affidavit

22 or declaration was missing; correct?

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1 action were responded to in the amendment. So it was

2 responsive.

3 Q So they are wrong when they say it was

4 nonresponsive then.

5 A Well, they still -- what he is saying here,

6 he wants the affidavit or declaration. That's what he

7 is asking for. So he wants more. He wanted to have a

8 complete response, which a declaration or affidavit

9 was missing. But that was addressed in the office

10 action.

11 Q So it was incomplete then.

12 A Well, the response was not incomplete

13 because it addressed the issue. That completes the

14 response. Because you can have this suspended, not

15 suspended, but you can have the affidavit or

16 declaration supplied at a later point in time after

17 the -- it's possible. But it didn't do it.

18 Q It didn't happen.

19 A It did not happen.

20 Q Okay. And as a result of the filing on

21 November 5th, 1992, the continued prosecution of the

22 patent was not allowed; right? It didn't allow it to

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1 A Correct.

2 Q At that point in time you became directly

3 involved in working on the prosecution of AXNN-15;

4 correct?

5 A That is correct.

6 Q And in fact you wrote to Mr. Sanderford in

7 a letter dated January 21st, 1993, Bates numbered

8 N000014, that we will mark for identification as P-27,

9 and told him about the decision of the Patent Office;

10 right?

11 A Yes, that's correct.

12 Q And that's your letter.

13 A That is correct.

14 (The documents referred to were

15 marked Plaintiff's Exhibits No.

16 26 and 27 for identification.)

17 BY MR. USDIN:

18 Q Now looking at P-27, this is a letter you

19 sent to Mr. Sanderford; correct?

20 A This?

21 Q Yes.

22 A Yes.

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1 Q And it encloses the decision, the office
 2 action by the examiner; correct?
 3 A Yes.
 4 Q And says that you have until February 19th
 5 in which to file a response with the proper affidavit;
 6 is that correct?
 7 A Correct.
 8 Q If the response isn't filed by that date,
 9 the patents will go abandoned; is that correct?
 10 A That is correct.
 11 Q There is no discussion in here about any
 12 other options that Sanderford or anyone else might
 13 have had that they may have pursued without the
 14 declaration from Mr. Arthur; is that correct?
 15 A That's correct.
 16 Q And you didn't have any conversations with
 17 Mr. Sanderford before the date of this letter about
 18 any of those options, did you?
 19 A That is correct.
 20 Q By the way, when you began directly working
 21 on this file did you physically take the file into
 22 your office? Is that how you work?

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1 your office?
 2 A Upon the times I was working on it, yes.
 3 Q And as soon as you finished it on a
 4 day-to-day basis would you send it back to the file
 5 room?
 6 A That is correct.
 7 Q When you would have conversations with the
 8 client -- for example, in February you talked about
 9 some conversations you had with the client -- would
 10 you have the file before you?
 11 A Typically, but not always.
 12 Q The declaration that we looked at before,
 13 you have had a chance to read it today. We took some
 14 time to read that. Right?
 15 A Which declaration are you talking about?
 16 Q Your declaration.
 17 A Yes.
 18 Q You don't recall seeing any mention of
 19 missing the filing because of any instructions from
 20 the client, do you?
 21 A That is correct.
 22 Q Instead you said that you had missed it

Page 122

1 A Yes.
 2 Q So the files that are actually active and
 3 that you are working on, you keep them in your office?
 4 A Well, they are kept in the file room and
 5 then when I work on them they are put on my desk.
 6 Q During the period there is any office
 7 action pending, or response to an office action
 8 pending, you would keep those in your office to work
 9 on?
 10 A No. No, no way. The file is too thick.
 11 We just can't do it.
 12 Q In January and February, though, you were
 13 working on this file; correct?
 14 A I was responsible for this file. That is
 15 correct.
 16 Q Weren't you working on it?
 17 A Well, I was waiting for the client to
 18 respond.
 19 Q Were you the attorney who was working with
 20 the client on the response to the office action?
 21 A That is correct.
 22 Q And therefore did you have that file in

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1 because, there was no filing because you had missed
 2 the deadline. You didn't realize the deadline;
 3 correct? That's what your declaration said.
 4 A At the time in 1995 when I prepared this
 5 declaration, this is the best -- this is what I
 6 believed to be true based on what I could remember and
 7 what I could find in my file. And I did not know
 8 about the other materials or did not recall, know or
 9 recall any other materials that might have altered or
 10 changed this declaration route in 1995. And I assumed
 11 when I saw no response to the Erin Pierce letter of
 12 about, it was the February 16th, 1993 letter, and I
 13 didn't see anything in my file, as you suggested it
 14 might be, which I wished I had a letter or
 15 correspondence, I just assumed I screwed up, I missed
 16 the deadline. That's the only logical conclusion I
 17 could have when I saw the file that way.
 18 Q Okay. When you submitted the declaration,
 19 you also arranged to get a declaration from your
 20 podiatrist; correct?
 21 A Yes.
 22 Q You arranged to get a declaration from your

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1 computer consultant?

2 A Yes.

3 Q And you arranged to get a declaration from

4 Dawn Molvin who was your office manager?

5 A Yes.

6 Q All of that to support the statements in

7 your declaration as to why you said in there you

8 missed the deadline; correct?

9 A Yes.

10 Q What role did Mr. Natoli play in January

11 and February of 1993 in connection with the Axonn

12 filing?

13 A I don't recall any role, if he had one or

14 not. I don't think he had -- I just don't recall.

15 Q Why was he removed from this file?

16 A He was leaving and I saw that this case had

17 a problem and for that reason I wanted to take

18 responsibility.

19 Q What problem was it that you saw?

20 A It was this declaration problem.

21 Q And that it would go abandoned if nothing

22 was done; correct?

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1 was missed was because of the reasons stated in your

2 declaration.

3 A Oh, yes. I thought the deadline was

4 totally missed and there was no communication to the

5 client nor response to Erin's letter of February 16th

6 and I just missed the deadline.

7 Q Right. But my question is when did you

8 stop believing that?

9 A Well, today is Thursday?

10 Q Uh-huh.

11 A I don't know if it was Monday, Tuesday or

12 Wednesday of this week. Probably Tuesday or

13 Wednesday. But I'm not sure which day. It's when I

14 saw this letter, or rather the memo from Erin Pierce

15 to Britton Sanderford of February 17th, 1993 it became

16 very apparent to me that, although I couldn't

17 remember, that Axonn considered whether to

18 unintentionally abandon their patent application in

19 view of the lock hold James Arthur had on them of a

20 lawsuit and refused to sign a declaration.

21 Q But the only question to you is when did

22 you come to that new realization? And your answer is

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1 A That is correct.

2 Q Did you have any discussions with

3 Mr. Natoli during that time period, January and

4 February, about this patent application?

5 A I don't recall.

6 Q Again, no notes of that.

7 A I don't have any notes.

8 Q Now is it your testimony that up until the

9 last few days when you have seen this document from

10 Ms. Pierce that it's been your understanding that the

11 reason the deadline was missed are reasons that are

12 stated in the declaration?

13 A Yes.

14 Q That's what you always believed up until

15 the last few days.

16 A No. It was what I believed when I looked

17 over this in 1995.

18 Q My question to you is when did you change

19 that realization?

20 A In the last two days.

21 Q So up until the last two or three days,

22 your understanding in your mind as to why the deadline

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1 earlier this week; is that right?

2 A Earlier this week, yes.

3 Q For the first time.

4 A Yes.

5 Q By the way, showing you a couple documents

6 that I will mark as P-28, which is the declaration of

7 Ronald Criss, you arranged for that declaration; is

8 that correct?

9 A Yes. I asked Dr. Criss for the

10 declaration, that is correct.

11 Q And you told him what you wanted in it?

12 A I didn't dictate what goes in here. He put

13 in here -- I couldn't write this declaration. It is

14 way beyond my skills.

15 Q But you told him the general subject

16 matter.

17 A I told him the general subject matter and

18 he said he could support it with a declaration.

19 That's correct.

20 (The document referred to was

21 marked Plaintiff's Exhibit

22 No. 28 for identification.)

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1 BY MR. USDIN:

2 Q P-29 is an exhibit that bears Bates number
3 N000022. It is a declaration of Charles Perilli. You
4 also arranged for that declaration to be executed;
5 correct?

6 A Yes. I asked Charles Perilli for the
7 declaration, that is correct.

8 Q And you told him the general subject matter
9 that was to be included; correct?

10 A I told him the issues and asked him could
11 he support it and he said yes and this was prepared.
12 That is correct.

13 (The document referred to was
14 marked Plaintiff's Exhibit
15 No. 29 for identification.)

16 BY MR. USDIN:

17 Q And that is the declaration you got
18 Mr. Perilli to sign; correct?

19 A Excuse me? That I what?

20 Q That you arranged for Mr. Perilli to sign?

21 A Yes.

22 Q And again it was to support the statements

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1 in your declaration; correct?

2 A That is correct.

3 MR. USDIN: Off the record.

4 (Discussion off the record.)

5 BY MR. USDIN:

6 Q Mr. Newman, do you remember responding to
7 some interrogatories in this litigation?

8 A I remember having to do it. I don't recall
9 the substance now at this point.

10 Q But you verified --

11 A Yes.

12 Q -- the answers that were given in response;
13 correct?

14 A That is correct.

15 Q These were provided to us on April 28th of
16 1997; correct?

17 A I can't see. I cannot see the date. Yes.

18 Q Why in response to the interrogatories that
19 you came up with did you not mention anything about
20 your foot condition or your docketing system if up
21 until a few days ago you were under the impression
22 that that was the reason the deadline was missed?

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1 MR. WOLBRETTE: Do we have the exact
2 question and exact answer you are referring to?

3 BY MR. USDIN:

4 Q I'm looking for the best one here. Well,
5 it would be interrogatory number six, which states
6 "Please describe in detail the basis of your second
7 defense," referring to your answer, "that the steps
8 taken by defendants in connection with the application
9 were taken at all times at the direction and
10 instruction of Axonn and/or Eckstein." That's six.
11 And 12, "Please identify the timing and details of
12 communications with Axonn and/or Eckstein regarding
13 the 'full information about the optional courses of
14 action available' as alleged in paragraphs 13 and 14
15 of Newman's Answer."

16 My question to you is why does your
17 response, if you were not even aware of what you say
18 you became aware of in the last few days, why did your
19 response not include anything about the docketing
20 system or your foot condition?

21 MR. WOLBRETTE: Well, I object to that
22 question. That question doesn't ask him anything

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1 about that. It asks for the basis of the second
2 defense and the steps taken by defendants in
3 connection with the application were at all times
4 taken at the direction and instruction of Eckstein or
5 Axonn. I don't see anything inconsistent with this
6 response to that question.

7 MR. USDIN: He said he just became aware of
8 that in the last few days.

9 MR. WOLBRETTE: No, he didn't.

10 MR. USDIN: That's what he testified to.

11 MR. WOLBRETTE: No. He said he just became
12 aware of this memorandum that indicates absolutely
13 that Axonn had been informed by him what the deadline
14 was. But that he screwed up because he didn't have
15 this memorandum, he could believe that. At the same
16 time he believed there was fault on the part of Axonn
17 and that he had in fact told them in January and that
18 he had been told not to do anything. It is also the
19 October-November issue. So I don't see anything at
20 all inconsistent about this.

21 MR. USDIN: What is the October-November
22 issue?

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1 MR. WOLBRETTE: The revival application.

2 MR. USDIN: I'm just trying to understand

3 what you were referring to when you said the
4 October-November issue. October-November '93?

5 MR. WOLBRETTE: Yeah.

6 MR. USDIN: Okay.

7 BY MR. USDIN:

8 Q When you verified the interrogatory
9 responses, was it still your understanding that you
0 had, as your attorney said, screwed up? He didn't say
1 you screwed up, but that you had screwed up by missing
2 the deadline because of your foot condition and
3 because of your docketing system crash?

4 A With respect to the February 18th-19th
5 date, yes.

6 Q And at the time you filed your answer to
7 the lawsuit in this case was your understanding the
8 same, that you had screwed up?

9 A Not totally. But with respect to missing
0 that date, yes.

1 Q It was not your understanding at the time
2 you filed either of those that Axonn had made the

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1 argument is, but whatever argument you want to make,
2 this is not the place to make it.

3 BY MR. USDIN:

4 Q Take a look if you would at your
5 interrogatory responses, please. I would like you to
6 take a look at interrogatory number six and your
7 response.

8 A Yes.

9 Q You reference contact with Britton.
0 Actually, I tell you what I would like to do. This
1 may expedite it a little bit. Read six and then read
2 12.

3 A Can I take about a five-minute break?

4 MR. USDIN: Off the record.

5 (Whereupon, at 11:43 a.m. the deposition
6 was recessed for lunch, to reconvene at 12:30 p.m.
7 this same day.)

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1 decision to let the patent go abandoned; correct?

2 A Intentionally or unintentionally. Yeah, I
3 did not have any recollection at that time.

4 Q At that time you thought that the reason
5 there was no filing in February was because of your
6 screw up; correct?

7 A It was because I missed a date. That is
8 correct.

9 Q But you didn't say that in your
10 interrogatory responses, did you?

11 MR. WOLBRETTE: Objection. We have just
12 been through that. You want me to read the question
13 and the answer again? You didn't ask him anything
14 about that.

15 MR. USDIN: You can read it or not. It
16 doesn't matter.

17 THE WITNESS: I don't recall right now.

18 MR. WOLBRETTE: The answers to
19 interrogatories speak for themselves. If you want to
20 read the answer, it clearly doesn't refer to his foot
21 condition. Now if you want to make an argument, you
22 don't need to do it here. I'm not sure what the

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1 AFTERNOON SESSION

2 (12:40 p.m.)

3 Thereupon.

4 DAVID B. NEWMAN, JR.

5 resumed the stand and testified further as follows:

6 EXAMINATION BY COUNSEL FOR THE PLAINTIFF - Resumed

7 BY MR. USDIN:

8 Q Mr. Newman, how much time this week have
9 you spent preparing for this deposition?

10 A Three days.

11 Q Three full days?

12 A Yes.

13 Q All day Monday, Tuesday and Wednesday?

14 A Yes.

15 Q And that includes meeting with counsel,
16 obviously?

17 A Yes.

18 Q And that includes reviewing documents?

19 A Yes, I reviewed the documents, that is
20 correct.

21 Q Did you review all of your documents that
22 you had in your files?

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1 A I reviewed all -- whenever you say all, the
2 reason I hesitate about these questions, you say all
3 and everything like that and I always think there is
4 one missing that I didn't see or something like that.
5 Because my mind thinks in absolutes. So I will say I
6 reviewed all the documents I had in my possession at
7 the time, yes.

8 Q Have you reviewed all the documents that
9 have been produced during this litigation by both
10 sides?

11 A I don't know that I have reviewed all that
12 you have produced on your side.

13 Q Your counsel didn't provide that to you.

14 A I don't know if they did or didn't. I have
15 problems when someone says all like that. So I'm
16 going to hesitate and I want to clarify from time to
17 time.

18 Q Before we broke we were looking at the
19 interrogatories and I asked you to go ahead and read
20 interrogatories six and 12.

21 A Okay. Yes, I read number six now. I'm
22 current on number six.

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1 remember having that before this week. And also I
2 remember the February 10th telephone conference which
3 we discussed with Michael Eckstein. And there was --
4 with respect to reviving on the time, on the February
5 16th, I don't recall any telephone conference as I
6 stated previously with Erin, but I do recall that
7 telephone conference with her just responding to her
8 letter. But I recall very little other than I said we
9 don't abandon the case.

10 Q I'm sorry?

11 A That we don't abandon cases.

12 Q You told her you don't abandon cases?

13 A It is my correct representation I think in
14 this interrogatory number 12 that I said we don't --
15 abandonment is not an option. It is not the option.
16 And it's not the way we talk. Not intentional
17 abandonment. Then I had discussions with Britton
18 Sanderford and Michael Eckstein in March, April.

19 Q All right. I'm trying to expedite this in
20 a way if I can. All of those are referred to in
21 number 12 and we are going to get to that.

22 A Okay.

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1 Q Go ahead and read number 12 too, please.

2 A Okay. I have read these, yes.

3 Q The first question I have is in
4 interrogatory number six you refer to contacts with
5 certain people and several occasions where you got
6 instructions. Are all of those contacts and
7 discussions that are referred to in number six also
8 referred to in number 12 or are there other ones other
9 than what are identified in number 12?

10 A There are others not identified in number
11 12.

12 Q Okay. Then starting at interrogatory
13 number six, what contacts did you have with Britton
14 Sanderford, Michael Eckstein and Erin Pierce to keep
15 them apprised of the status of the proceeding?

16 A At what point in time?

17 Q Any of the ones that you are referring to
18 in number six.

19 A Well, clearly the February 1, 1993
20 telephone conference, which I want to correct my
21 previous testimony about I do remember having that
22 telephone conference not before this week, but I

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1 Q Other than the ones that are in 12, I'm
2 interested in what you are referring to in
3 interrogatory number six in addition to the
4 conversations laid out in number 12.

5 A Lord.

6 Q If any.

7 A It's hard to remember. I remember having
8 telephone conferences in September of 1993 with Mike
9 Eckstein. And I remember telephone conferences --

10 Q September of what year?

11 A 1993. And I remember telephone conferences
12 in October. There were telephone conferences in
13 October of 1993, but I don't remember much detail.
14 I'm sure there were telephone conferences in November
15 of 1993. I don't know if I had any telephone
16 conferences in December of 1993 or not. I can't
17 recall. Then there were some in January of 1994 and
18 there may be other telephone conferences in '94 too.

19 Q Tell me what conversations you recall with
20 anyone relating to Axonn. What conversations do you
21 recall with anyone from Axonn in September of 1993?

22 A I remember one with Mike Eckstein. He

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1 called me in the evening at home. And the issue, I
2 thought he was calling about revival of the patent
3 application, that this was important, and instead he
4 called, he wanted to talk about having a kickback and
5 some fee on the Cargill case.

6 Q So he was talking about the Cargill fee,
7 nothing about the abandoned patent?

8 A He said that was not important to him. The
9 fee was what was important. That is what he wanted to
10 talk about.

11 Q Those were his words?

12 A I don't recall his words.

13 Q Tell me what you can recall that he said.

14 A Well, I can't recall words from 1993.

15 Q Did he tell you that the revival of the
16 patent was not important?

17 A Well, he put it in comparison.

18 Q Tell me what he said that you can recall.

19 A I just recall that he wanted to talk about,
20 he put it, he said he wanted to talk about fee. He
21 didn't want to talk about revival. Revival would be
22 more important.

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1 A Well, these were a number of telephone
2 calls during September of 1993.

3 Q So there was more than one.

4 A Yes.

5 Q Because you said there was one you recall
6 he called you at home.

7 A They were all at home.

8 Q So how many were there?

9 A I don't recall. He could always get me at
10 home when he wanted to call me.

11 Q At the end of the discussion about the fee
12 did you bring it back to the abandoned patent and
13 discussions about the revival effort?

14 A No.

15 Q So you didn't bring it up again?

16 A No.

17 Q Did you bring it up in the first place, the
18 abandoned patent, or he brought it up?

19 A I believe I brought it up, because that was
20 something that everybody was aware of and I thought
21 this is, you know, he had some news. He had
22 responsibility for getting these declarations in the

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1 Q Did he say that the revival wasn't
2 important or did he just say he didn't want to talk
3 about that, he wanted to talk about the fee?

4 A No, he said the fee is more important.

5 Q He said the fee is more important?

6 A I don't recall the exact words. Because
7 you are asking me what he said now. I can't remember
8 the exact words. I just remember that he wanted to
9 talk about the fee and there was discussion.

10 Q Did he say that he did not want to talk
11 about the abandonment because it was not important?
12 Do you recall him saying that or words to that effect?

13 A I don't recall the exact words.

14 Q Do you recall him saying words to that
15 effect, whether they are the exact words or not?

16 A It was my present sense impression at that
17 time from the telephone conference that the
18 abandonment was not important to him, the fee was what
19 was important.

20 Q In that conversation or generally?

21 A In that conversation.

22 Q How long was that conversation?

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1 James Arthur case and I thought he had news for me.

2 Q But he didn't say he had any news for you
3 in September; is that correct?

4 A I don't -- well, obviously he didn't have
5 any, so I don't recall any.

6 Q What else do you recall about any of the
7 conversations in September of 1993?

8 A He wanted a piece of the fee of the Cargill
9 case.

10 Q Was that what all of the conversation was
11 about?

12 A That's what it stayed focused on.

13 Q In any of the other September 1993
14 conversations were there any discussions about the
15 abandoned patent?

16 A I don't recall.

17 Q You don't recall any?

18 A I don't recall.

19 Q Was anybody else involved in these
20 discussions other than the two of you?

21 A Yes.

22 Q Who?

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1 A Martin Freeman.
 2 Q When was he involved?
 3 A After one of the calls from Mike Eckstein I
 4 called Marty Freeman and told him that Mike Eckstein
 5 wanted a piece of the fee.
 6 Q So Mike wasn't on the phone. It wasn't a
 7 three-way.
 8 A No.
 9 Q It was you hung up with Mike Eckstein and
 10 then called Marty Freeman.
 11 A Yes. And then eventually Marty Freeman
 12 called Mike Eckstein.
 13 Q But when you spoke to Mr. Freeman, there
 14 was no discussion about the abandoned patent, was
 15 there?
 16 A No. That wasn't his problem. He wasn't
 17 concerned.
 18 Q He had nothing to do with that; right?
 19 A That's correct.
 20 Q Were you willing to give Mr. Eckstein any
 21 portion of the fee, let him share in the fee?
 22 A Ultimately Marty Freeman and I gave him a

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1 Q Who?
 2 A It could have been Mike Eckstein, Erin
 3 Pierce, Britton Sanderford.
 4 Q Who do you remember? I'm not asking you to
 5 guess. Just who do you remember talking to?
 6 A At this point I don't recall the person on
 7 the telephone with whom I was talking. I just don't
 8 recall.
 9 Q Were they using more than one person
 10 involved on Axonn's end?
 11 A Oh, yeah. Yeah, there were Erin Pierce,
 12 Britton Sanderford for this case, Mike Eckstein.
 13 There might have been one or two secretaries or
 14 support people who I'm not sure what their positions
 15 were who would also take, would substitute in for
 16 these people.
 17 Q And they would all be on the phone at the
 18 same time?
 19 A Oh, no. No, it would be a different person
 20 at a different time.
 21 Q Was that with respect to the abandoned
 22 patent?

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1 two and a half percent.
 2 Q Anybody else involved in your discussions
 3 with Mike Eckstein in September of 1993?
 4 A I don't recall.
 5 Q Okay. Anything else you can recall about
 6 the discussions in September 1993?
 7 A No.
 8 Q Do you recall any discussions with Britton
 9 Sanderford in September 1993?
 10 A I don't recall.
 11 Q How about Steve Fant?
 12 A About this case? I don't recall.
 13 Q How about Erin Pierce?
 14 A I don't recall.
 15 Q And again, that's about this case.
 16 A Yes.
 17 Q You don't recall any such conversations?
 18 A I don't recall. In September 1993 I don't
 19 recall.
 20 Q Okay. Then in October 1993 you said you
 21 had some more discussions. Who were those with?
 22 A People at Axonn.

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1 A Yes.
 2 Q Tell me what you recall about those
 3 discussions.
 4 A I remember there was -- I just recall that
 5 there were discussions in October of 1993 that we had
 6 to get this case revived and everybody -- we were
 7 moving towards the November 8th to get the case
 8 revived as unintentional and they were looking forward
 9 to us getting the materials to them as soon as
 10 possible so we could, they would get the declaration
 11 signed, and we did that. We got the materials towards
 12 the latter part of October of 1993.
 13 Q Was there any discussion about what options
 14 Axonn had if they did not get declarations from all of
 15 the inventors?
 16 A Yes.
 17 Q Tell me about those discussions and who
 18 they were with and when they were.
 19 A I don't recall who the discussions were
 20 with, but the options were again filing a, reviving a
 21 case and filing a continuing application, filing under
 22 Rule 47. Basically it was a disgruntled employee

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1 approach. Or Rule 183. Both of them required an
2 affidavit of a type. And a third was the option of
3 getting the signature of James Arthur and the other
4 people on the declaration.

5 Q You don't recall who at Axonn you talked to
6 about that.

7 A At this time I don't, no.

8 Q And you reviewed your files?

9 A Yes.

10 Q And that didn't help you; right?

11 A It did not.

12 Q Did you see anything in your files in
13 writing about those options?

14 A No, I did not see anything in my file.

15 Q Did you see any drafts of any petitions
16 under Rule 47 or 183?

17 A No. No, there wouldn't be any because they
18 didn't want us to proceed on that route. They didn't
19 want us to make representations that Arthur was an
20 inventor.

21 Q Did you tell them what the consequence of
22 that would be if they couldn't get the Arthur

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1 affidavit?

2 A Yes.

3 Q What did you tell them that consequence
4 was?

5 A Well, we were shooting -- we had to get a
6 response filed. If we didn't get something filed, the
7 case would be irretrievably abandoned. And we were
8 shooting for the November 8th date to be safe so we
9 would have it filed on time.

10 Q What happened to that November 8th date?

11 A They didn't respond with the Arthur
12 affidavit.

13 Q They meaning Axonn?

14 A Axonn. And around November 5th, 1993 I
15 received a letter from Mike Eckstein, pretty close to
16 the close of business, telling me that, I believe the
17 letter told me he could not get -- I forget the exact
18 contents, but the letter speaks for itself. Addressed
19 the issue.

20 Q The letter to your recollection said he
21 could not get the declaration?

22 A The letter speaks for itself. Something of

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1 that nature. He was still working the problem. He
2 was still working the issue.

3 Q I'm trying to get your recollection.

4 A It would be a lot easier if I read the
5 letter.

6 Q What is your recollection of it?

7 A Well, he didn't have the declaration of
8 James Arthur.

9 Q Did he indicate whether he was going to get
10 it or not, whether he thought he would sign?

11 A I don't recall what the letter says.

12 Q Did you ever communicate to Axonn that
13 November 8th was the deadline?

14 A Yes.

15 Q To whom did you communicate that?

16 A Several people I would imagine.

17 Q I'm not asking you to imagine. I'm asking
18 you who you remember telling it to.

19 A I remember telling it to someone, but again
20 I'm not sure. I remember telling someone in October
21 because we were moving towards that deadline at that
22 time. We had a lot of activity trying to meet the

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1 deadline of October of 1993. And I remember talking
2 about the deadlines to someone in Axonn around
3 February of some of the deadlines that they would be
4 facing.

5 Q February of '93.

6 A Yes.

7 Q So you believed at that time that the
8 deadline was November of 1993; correct?

9 A Well, I believed, actually I believed the
10 deadline was February 1994. But to be safe, I thought
11 we should have it filed by February -- by November of
12 1993.

13 Q Did you ever inform anyone at Axonn of that
14 in writing?

15 A No, I did not.

16 Q So you believed that it was at least a
17 reasonable possibility that the November date was a
18 deadline.

19 A Well, to be safe. I knew if we did it by
20 then, I knew we were safe, but I believed we had until
21 February of 1994 to respond. Because it --

22 Q Why -- excuse me.

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1 A Go ahead.

2 Q Why did you think the November date was a
3 safe date?

4 A Well, when I read the rules on reviving the
5 case, the question is when did the case go abandoned,
6 and I calculated the case to go abandoned from
7 February of 1993, so that one year for reviving what
8 is unintentional would be to February of 1994.

9 Q How did you come up with November?

10 A The November comes from the abandonment --
11 the rules are ambiguous because it says it could --
12 that the abandonment goes from the -- it comes up more
13 simple than this. The issue was was the case pending
14 in January to February 1993 or was it abandoned during
15 that period of time. If it was abandoned, then we
16 were going for the November date. But if the case was
17 in fact pending until February of 1993, then we had
18 one year from February 1993 to file a response.

19 Q But there was at least some ambiguity there,
20 in your mind; right?

21 A There was some ambiguity, yes.

22 Q Did you communicate that ambiguity to the

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1 client at some point?

2 A Yes, I did.

3 Q But never in writing.

4 A No.

5 Q Only in a telephone conference.

6 A Also in person.

7 Q In person.

8 A I believe there -- well, there were some
9 discussions about meeting some deadlines when I was at
10 Axonn in March of 1993.

11 Q So only oral; correct?

12 A Yes, that's correct.

13 Q And you don't recall with whom those
14 conversations took place?

15 A I don't recall right now, no.

16 Q So you believe that you had conversations
17 in March of 1993 about how long you had to revive?

18 A On the period of abandonment, yes.

19 Q When was the notice of abandonment?

20 A That was April or May. I believe it was
21 May of 1993.

22 Q So why were you having discussions with

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1 them about the period of abandonment when you hadn't
2 gotten the notice of abandonment yet?

3 A I wanted to get the case revived in March
4 1993. I wanted to move. I did not want the case
5 staying abandoned. That was my call.

6 Q So you knew it was abandoned already.

7 A Yes.

8 Q How did you know that?

9 A The telephone conference with someone from
10 Axonn, perhaps Mike Eckstein.

11 Q He told you it was abandoned?

12 A Per previous telephone conferences, yes.

13 Q And those conversations took place in
14 February and March or April or when?

15 A March 1993.

16 Q How did he know that it had gone abandoned
17 if the notice of abandonment didn't come until May?

18 A Oh, I told him in January it was abandoned
19 on February 18th-19th, 1993.

20 Q So you were aware that nothing had been
21 filed, obviously.

22 A Sure. So it went abandoned.

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1 Q And at that time you were perfectly aware
2 of the circumstances under which it had been
3 abandoned; is that right?

4 A Not totally. I was aware that they were in
5 a situation with James Arthur that he didn't want to
6 sign a declaration and I was aware that they had a
7 lawsuit in connection with James Arthur. And I was
8 instructed they did not want me filing -- the
9 instructions were coming to me that every time I
10 wanted something to be filed like a declaration or
11 something of that nature that involved, that would be
12 stating that James Arthur is an inventor, that that
13 couldn't be, I couldn't proceed with those
14 representations. So this situation put them in an
15 unintentional or unavoidable situation where their
16 hands were tied. I don't think it's a case where they
17 wanted to abandon the case. But I saw then they were
18 in a situation what else was there left for me to do
19 for them.

20 Q So your testimony is that starting in March
21 or even earlier you started talking about what you
22 could do to revive it.

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1 A Oh, yes.
 2 Q Looking at interrogatory number six again,
 3 the second sentence says that on several occasions you
 4 were instructed by Mr. Eckstein to take no further
 5 action, and then the sentence goes on. The several
 6 occasions that you received those instructions, are
 7 those the ones that are set forth in response to
 8 interrogatory number 12?
 9 A At least those. There may be others, too.
 10 Q Do you recall any others as we sit here
 11 today?
 12 A As we sit here right now, no.
 13 Q Now turning to interrogatory number 12, you
 14 talk about a February 1st discussion that you have
 15 testified to previously today; correct?
 16 A Yes, that is correct.
 17 Q How do you know it occurred on February
 18 1st?
 19 A I returned from a trip and this to me was
 20 the most important thing to attend to when I got back.
 21 And I believe it was February 1st was the date that we
 22 had the telephone conference.

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1 Q Do you have those telephone bills?
 2 A No.
 3 Q Where are those telephone bills kept?
 4 A In the office.
 5 Q You keep them in your office itself?
 6 A Yes.
 7 Q Going back to February 1st of 1993?
 8 A Yes.
 9 Q You don't put them in storage.
 10 A Well, they may be in storage. I'm not
 11 sure.
 12 Q Do you recall getting these documents from
 13 storage in order to review them to prepare these
 14 interrogatory responses?
 15 A No.
 16 Q Where would the telephone records be kept
 17 in your office? They wouldn't be kept in the file
 18 relating to Axonn for example, would they?
 19 A No, they would not.
 20 Q Are they kept in a separate bills file?
 21 A Bills file, that's correct.
 22 Q Is it your testimony that you did or did

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1 Q How do you know that though?
 2 A I believe it was on or about that date.
 3 Q I understand that you believe that. I
 4 understand that you have sworn to that in your
 5 interrogatories.
 6 A Sure.
 7 Q My question to you is how now in 1997 or in
 8 April of 1997 when you signed these were you able to
 9 recall that on February 1st, that specific date, you
 10 had a telephone conversation and a lengthy telephone
 11 conversation?
 12 A Because it was lengthy, for one. It was a
 13 long telephone conversation.
 14 Q Do you recall the date of all your lengthy
 15 telephone conversations?
 16 A I do not.
 17 Q Did you refer to any notes or documents to
 18 fix that date when you were preparing these
 19 interrogatory responses?
 20 A I did not refer to any notes or documents
 21 that I can recall right now. I may have referred to a
 22 telephone bill to help refresh my memory.

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1 not review that in preparing these interrogatory
 2 responses?
 3 A I don't recall for sure.
 4 Q That was in April of this year. Do you
 5 recall that?
 6 A No. I recall April, but I don't recall
 7 reviewing it.
 8 MR. USDIN: With some suggestion that he
 9 relied on that, we would like to see those records.
 10 MS. MANNING: What records? The February?
 11 The phone bills from --
 12 MR. USDIN: Whatever he --
 13 MS. MANNING: I don't think we can identify
 14 what he referred to. If you are making a request for
 15 the phone bill for the office for February '93.
 16 MR. USDIN: Well, he has said that he might
 17 have used that to pick this date.
 18 MR. WOLBRETTE: Then he said he didn't
 19 recall. But we will find it and give it to you. No
 20 problem.
 21 BY MR. USDIN:
 22 Q Is there anything else that you could have

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1 used to fix that date in your own mind in April of
2 1997?

3 A I don't recall.

4 Q Is it your testimony that it was the
5 purpose of the February 1st conversation to discuss
6 the abandoned patent or was the purpose to discuss
7 other matters as well, for example the Cargill
8 litigation?

9 A The purpose, both purposes were served
10 during the telephone conference and those -- my
11 concern during that telephone conference was the
12 abandoned patent application because the Cargill case
13 was something in the future for which I had not been
14 retained.

15 Q How do you recall that it was lengthy?

16 A A telephone conference is very unusual
17 because it was from Mike Eckstein's office with
18 Britton Sanderford. That I thought was very unusual.
19 I never had a call like that.

20 Q They called you?

21 A Yes. Maybe I called them. I'm not sure.

22 Q Well, would you have called Mike Eckstein

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1 at his office?

2 A I might have returned a phone call for that
3 matter. I just don't recall.

4 Q Was this the first time you had told them
5 about what other options they might have other than
6 filing with Mr. Arthur's cooperation?

7 A That is correct.

8 Q Why had there been no discussion about any
9 of those options previously, do you know?

10 A I was out of town until that weekend.

11 Q When did you leave town?

12 A Just about the time that I sent out the
13 letter on the office action in January of 1993 and I
14 returned that week, the following weekend.

15 Q Was Mr. Natoli still in the office then?

16 A Yes.

17 Q But he wasn't working on this then.

18 A That is correct. To the best of my
19 recollection he was not.

20 Q What did you tell them the cost of the
21 different options would be?

22 A I don't recall.

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1 Q This was an unusual telephone conversation
2 for you you thought?

3 A Yes.

4 Q Why?

5 A Because I had both Mike Eckstein and
6 Britton Sanderford on the telephone call.

7 Q But you have no notes of the conversation,
8 do you?

9 A Today I do not have any notes.

10 Q Do you recall ever having any notes about
11 it?

12 A I don't recall.

13 Q When Mr. Sanderford indicated he didn't
14 want to incur the fees connected with those other
15 options, do you have any recollection of how expensive
16 you told him those options would be?

17 A I don't recall.

18 Q When he said that there was no employment
19 agreement with Axonn and Mr. Arthur, was that a
20 necessary element of a disgruntled employee affidavit?

21 A No, it was not.

22 Q Did you tell him that?

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1 A Yeah. I said we can proceed with a
2 disgruntled employee affidavit. That was my planned
3 approach. The disgruntled employee affidavit is what
4 I was looking for. The employment agreement, I asked
5 did he have one, and they said no, he did not have
6 one.

7 Q But that wasn't a necessary element for
8 filing one, was it? It is not a requirement, is it?

9 A Oh, no, it is not required.

10 Q It was something you thought would help; is
11 that right?

12 A That is correct.

13 Q Did you tell them how much it would cost to
14 prepare and file under the disgruntled employee
15 process?

16 A I don't recall.

17 Q Did you tell them in that conversation what
18 would be the effect of not filing on February 18th or
19 19th?

20 A On that date I don't recall if I did or
21 didn't.

22 Q Did you tell them that it was a simple and

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1 cheap procedure to revive if nothing was filed?

2 A At that point in time?

3 Q Yes.

4 A I don't recall doing that at that point in
5 time.

6 Q Did you tell them that it would cost
7 between \$600 and \$1,200 to revive it if nothing was
8 filed in February?

9 A Oh, because of their unintentional
10 abandonment?

11 Q I'm asking if you recall telling them that.

12 A I don't recall.

13 Q And as a result of that conversation was
14 there an action planned on what you were going to do?

15 A I was waiting for them to get back to me
16 because they said they were going to pursue getting
17 Arthur's signature on the declaration.

18 Q You never followed up with them over the
19 next week or so, did you?

20 A Not in that -- well, there was a telephone
1 conference with Mike Eckstein around the 10th.

2 Q Right. But between then and the 10th.

Page 167

1 10th?

2 A There was a letter dated on or about
3 February 10th where he sent me a copy of a complaint
4 filed by Arthur. And I recall that I had a telephone
5 call with Mr. Eckstein prior to receiving, like about
6 a day or two prior to receiving a copy of his letter
7 and the complaint.

8 Q And again you have no notes of that
9 conversation?

10 A I have no notes.

11 Q No file memo?

12 A No file memo.

13 Q And no file memo, by the way, about the
14 February 1st one either; correct?

15 A That is correct.

16 Q And no letter that relates to the
17 conversation.

18 A No. No, the procedures that were given
19 were very straightforward to use. Everybody
20 understood. They clearly, they understood the options
21 of what we could do and what it would take. There was
22 no need, because they understood, to have a memo or

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1 A I don't recall any further telephone call.

2 Q Did you conduct any legal research or ask
3 anyone to conduct legal research regarding the options
4 they might have at that time?

5 A No, I did not.

6 Q Did you write to them as a result of that
7 February 1st conversation and tell them what would be
8 the effect if they didn't do something by February
9 18th?

10 A I did not.

11 Q Or the 19th?

12 A I did not.

13 Q The next conversation you refer to in the
14 interrogatories is the one on February 10th.

15 A Yes.

16 Q Did you call Mr. Eckstein or did he call
17 you?

18 A My recollection is he called me.

19 Q How do you know that it was on February
20 10th?

21 A On or about February 10th.

22 Q How do you know it was on or about February

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1 letter.

2 Q Didn't you testify earlier, Mr. Newman, it
3 was not clear what the effect of doing nothing would
4 be, whether that would be intentional or
5 unintentional? Correct?

6 A I don't recall testifying that.

7 Q Okay. Was it clear as to what the effect
8 of not filing would be on February 18th?

9 A Oh, it was clear if they did not file on
10 February 18th or 19th that the case would go
11 abandoned.

12 Q Was it clear it would go intentionally or
13 unintentionally abandoned?

14 A Well, from my judgment, it was
15 unintentional abandonment because it was not a
16 situation that they wanted to be in that allowed it to
17 go abandoned. They were put into a situation where
18 they could not react. Therefore, in my judgment that
19 was an unintentional situation.

20 Q Were you certain about that conclusion?

21 A What do you mean certain about it?

22 Q Were you certain that it would be

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1 considered unintentional?

2 A I'm sure certain that that was my judgment.

3 Q Were you certain that it would be
4 determined to be unintentional by the Patent Office?

5 A Well, I don't know anything -- I don't know
6 any way that one is certain about the outcome of any
7 proceeding, so I can't say that.

8 Q Did you tell the client that there was a
9 risk that it would be determined to be an intentional
10 abandonment and therefore the abandonment would be
11 irretrievable?

12 A If they did not revive the case, it became
13 apparent that may become an intentional abandonment
14 because they decided not to proceed to revive the
15 case. So yes.

16 Q Did you tell them that there was a risk
17 that the Patent Office would determine that no filing
18 on February 18th was intentional and that therefore
19 the abandonment would be irretrievable?

20 A I don't recall.

21 Q You don't recall telling them that?

22 A I don't recall one way or another.

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1 correct?

2 A Yes.

3 Q And in that conversation what did you tell
4 Mr. Eckstein would happen if he didn't get the
5 declaration signed by Mr. Arthur in the next eight
6 days?

7 A We had to go another route, which would be
8 the disgruntled employee approach, prepare an
9 affidavit signed by Britton Sanderford and then I
10 could proceed and take action.

11 Q What did Mr. Eckstein respond to that?

12 A He told me to hold off.

13 Q He told you not to do anything?

14 A Yes.

15 Q Did he tell you not to prepare any
16 paperwork?

17 A He just told me to hold off, not do
18 anything.

19 Q And did he tell you when he would get back
20 to you?

21 A I don't recall when.

22 Q Did you tell him when he had to get back to

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1 Q The February 10th conversation, was the
2 purpose of that to discuss the James Arthur situation?

3 A To tell me that Axonn had been sued by
4 James Arthur.

5 Q At that point on February 10th did you
6 believe that it was still possible that you would get
7 a declaration signed by Mr. Arthur?

8 A Yes.

9 Q What was the basis for that belief?

10 A I asked Mr. Eckstein what was the status,
11 and as I best recall, he was going to check into it
12 and I would get some response.

13 Q Did you consider the filing of the lawsuit
14 by Mr. Arthur to be a hostile act towards Axonn?

15 A It would be, yes.

16 Q Did you consider that to be an indication
17 that Mr. Arthur would or would not cooperate in the
18 filing of any declaration?

19 A Yes.

20 Q And what was that?

21 A It would -- he would be hostile.

22 Q And therefore not likely to cooperate;

Page 172

1 you?

2 A I don't recall.

3 Q Did you tell him that if you didn't hear
4 from him by the 18th the patent would go abandoned in
5 that conversation?

6 A Well, he knew that. He knew that date.

7 Q I didn't ask you that. I asked you if you
8 told him that in that conversation.

9 A I don't recall if we talked about that or
10 not. We may have.

11 Q Did you contact the client, Mr. Sanderford,
12 after you had this conversation with Mr. Eckstein?

13 A I was waiting for a response from
14 Mr. Eckstein.

15 Q Did you contact the client after --

16 A Mr. Eckstein was part of the client.

17 Q Who owns Axonn, do you know?

18 A No, I don't.

19 Q Do you know who the CEO is?

20 A Yes.

21 Q Who?

22 A Britton Sanderford.

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1 Q Did you contact Mr. Sanderford after you
2 had talked to Mr. Eckstein to confirm the instructions
3 you had just been given?
4 A Mr. Eckstein's instructions?
5 Q Yes.
6 A No.
7 Q Did you write a letter confirming that you
8 had been instructed eight days before deadline by
9 which a patent application would go abandoned that you
0 were to take no action to stop that abandonment?
1 A I did not. But back on your previous
2 question, Mr. Sanderford was asked to call me per a
3 telephone call with Erin Pierce following on the 16th.
4 Q And it's your testimony he did not call
5 you.
6 A I don't recall.
7 Q You don't recall whether he did or not.
8 A That is correct.
9 Q You didn't call him though.
0 A That may have been a call to him and he was
1 asked to call me.
2 Q But even after that, you don't recall that

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A Yes, I have.
Q And this particular version is from your
file; correct? It has an N at the bottom?
A Oh, okay. Fine.
Q Do you recall that Ms. Pierce had been
trying to get in touch with you by telephone for a few
days to find out the status on a few issues?
A I don't have any recollection of that.
Q You don't deny it. You just don't recall
one way or the other.
A I don't recall. But I know this -- I think
February 16th was a Monday or a Tuesday. So if it was
the previous two days, that would be a Saturday or
Sunday. That would be unusual. I talked to
Mr. Eckstein the previous two days, two or three days
before that. So I don't have any recollection of her
calling me or not trying to call me during that time.
Q But you don't know whether she was talking
about business days or weekends. You are just
assuming; correct?
A Yeah. Let's see. Yeah, that's correct.
Q And you know that February 16th was a

Page 174

1 it was a call that you made to him, do you?
2 A I don't recall which way it went.
3 Q You don't recall whether it was Erin Pierce
4 calling you, for example.
5 A Yeah. I don't recall which way it went.
6 Q The next conversation you had was not until
7 February 16th; correct?
8 A Correct.
9 Q And in fact Ms. Pierce wrote to you on that
10 date, February 16th; is that right?
11 A That is correct.
12 Q We are going to mark for identification as
13 P-30, I believe, a February 16th, 1993 letter from
14 Ms. Pierce to you by fax.
15 A That is correct.
16 Q Take a minute and read that, please.
17 (The document referred to was
18 marked Plaintiff's Exhibit
19 No. 30 for identification.)
20 BY MR. USDIN:
21 Q Have you had a chance to review the letter,
22 Mr. Newman?

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1 Monday?
2 A I don't know it. It may have been. I
3 don't know, Monday or Tuesday.
4 Q How do you know that?
5 A I don't recall. I just -- I remember one
6 time I must have checked the calendar. But I just
7 don't recall which day it was. I remember it was
8 earlier in the week.
9 MR. WOLBRETTE: I have a calendar, if that
10 would help.
11 MR. USDIN: Sure. When is it?
12 MR. WOLBRETTE: February the 16th, '93 is a
13 Tuesday.
14 MR. USDIN: Okay.
15 THE WITNESS: Okay.
16 BY MR. USDIN:
17 Q And this appears to be at about 1742. That
18 would be 5:42; right? Am I doing that right? See up
19 at the top?
20 A Yes.
21 Q The third paragraph indicates, it is
22 talking about the wireless alarm. Is that the

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1 abandoned patent as far as you understand?

2 A Yes, it is.

3 Q It appears that in there she is asking what
4 the status is; correct?

5 A That is correct.

6 Q So she at least from this letter did not
7 know what the status was at that point, nor did
8 Britton; correct?

9 A Well, I don't know what Britton knew from
10 this letter. She is inquiring on the status.

11 Q It says "Britton and I would like to know
12 the status"; correct?

13 A Yes, that's correct.

14 Q And she wanted to know whether they were
15 filing a disgruntled employee affidavit; correct?

16 A That is correct.

17 Q And she also wanted to know whether they
18 would need to let it go abandoned and then revive it;
19 right?

20 A That's correct.

21 Q Is that one of the options you told them
22 they had?

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1 February 17th.

2 Q And this letter was in your files; right?

3 A Yes, that was.

4 Q It was in your files when you executed your
5 declaration; right?

6 A Oh, yes.

7 Q So you knew about this letter when you
8 executed your declaration; correct?

9 A Oh, yes. But the letter does not address
10 whether or not I abandoned -- advised them of when --
11 whether they were fully aware that the date was coming
12 up to February 18th or 19th. And so when I saw this
13 letter with nothing else in my file, I said I must
14 have not advised -- I concluded I did not fail -- I
15 failed to advise them at that time.

16 Q But my point is you had read this at the
17 time you executed your declaration; correct?

18 A That is correct.

19 Q Do you recall whether or not you called
20 Erin Pierce after you got this or she called you?

21 A I don't recall.

22 Q When you had the conversation with

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1 A If it was unintentional abandonment, yes.

2 They could revive it if the abandonment was
3 unintentional.

4 Q And the whole issue of whether you can let
5 something go abandoned and/or not goes back to, the
6 issue of whether you can let something go abandoned
7 and have it be unintentional goes back to the issue
8 you talked about earlier about whether they were in a
9 bind; is that right?

10 A This is an exceptional case because I see a
11 lot of clients who from time to time intentionally
12 abandon cases and don't want the case and it's clear
13 they don't want to have it. In this situation these
14 people were in a situation where as I see it they were
15 facing a dilemma of trying to get an affidavit from
16 James Arthur at the same time that he has filed a suit
17 and he is not cooperating for giving an affidavit.
18 And they ultimately had also taken a position not to
19 do anything because they didn't want me making
20 representations that James Arthur was an inventor. So
21 this was thrown back to her, what are you going to do?
22 And that apparently is reflected in her memo of

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1 Ms. Pierce, was this on the 16th or the 17th, do you
2 recall?

3 A I don't recall.

4 Q Do you recall any discussion at that time
5 about filing the disgruntled employee affidavit?

6 A Yes.

7 Q What do you recall about that?

8 A I asked if that's how to proceed now, had
9 they changed their tact. Was that the proceed they
10 wanted to go. And she said she would get back to me.
11 She never did.

12 Q Did you ever get back to her to find out
13 what the answer was?

14 A I don't recall if we did or did not.

15 Q Again, no notes or letters or anything
16 about that?

17 A Well, there is this here that --

18 Q By you.

19 A -- confirms.

20 MR. WOLBRETTE: No, by you.

21 THE WITNESS: By me, no.

22 BY MR. USDIN:

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1 Q What's that?

2 A No. By me, no.

3 Q In the conversation with Ms. Pierce did you

4 discuss Mike Eckstein's prior instructions that you

5 not do anything?

6 A I don't recall.

7 Q What did you tell her about abandonment not

8 being an acceptable option in that conversation, if

9 anything?

10 A That intentional abandonment was not an

11 exceptional option --

12 MR. WOLBRETTE: Exceptional or acceptable?

13 THE WITNESS: -- acceptable option if they

14 wanted to keep the case going.

15 BY MR. USDIN:

16 Q What did you tell her about an

17 unintentional abandonment at that time?

18 A I just don't recall at this point.

19 Q Did you tell her that the Patent Office

20 would let Axonn revive its patent just by paying a fee

21 of \$585?

22 A At that point in time or later point in

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1 to hear back from her between then and the next day

2 when the application was due; is that correct?

3 A That's correct. I did not have

4 authorization to proceed.

5 Q But you knew that was a possibility at that

6 point; right?

7 A It was a possibility. But not within the

8 situation they were in.

9 Q Why?

10 A Because they were taking a position that

11 they didn't want to make a statement that Arthur was

12 an inventor at that point. But I did not know the

13 whole facts in February of 1993 of what was going on.

14 Can we take about a 10-minute break?

15 Q Yeah. I think we need to keep the breaks

16 as short as we can if we want to complete.

17 (Brief recess.)

18 BY MR. USDIN:

19 Q According to the interrogatories, the next

20 communication you had after February 16th was after

21 the notice of abandonment was received; correct?

22 A No, the abandonment was received in April,

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1 time?

2 Q At that point in time.

3 A I may have, yes.

4 Q How did you come up with that number?

5 A The fee was the unintentional fee for

6 reviving is unintentional.

7 Q Under what provision?

8 A It's rule -- I have to look at the rule

9 books.

10 Q Now you claim you asked Mr. Sanderford to

11 call you.

12 A Yes.

13 Q You asked her to have Mr. Sanderford call

14 you; correct?

15 A Yes.

16 Q But you didn't try to call him?

17 A No. I relied on her having him give me a

18 call.

19 Q And you didn't write to them.

20 A I did not.

21 Q And you didn't begin preparing a

22 disgruntled employee affidavit while you were waiting

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1 May, but the next meeting was in March of 1993.

2 Q I'm looking at your interrogatory

3 responses.

4 A After the notice of abandonment was

5 received. Okay, that's May of 1993.

6 Q So that wouldn't be correct then.

7 A Oh, this is --

8 Q In other words, this is out of order.

9 A This is out of order.

10 Q So the next one would have been in March of

11 1993; correct?

12 A Correct.

13 Q You had come down to New Orleans to meet

14 with Axonn?

15 A Yes.

16 Q And the purpose of your coming down to meet

17 in New Orleans with Axonn relates to the Cargill

18 litigation; correct?

19 A Precisely correct, yes.

20 Q And you came with Mr. Freeman?

21 A Yes.

22 Q And with Ms. Bailey?

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1 A Yes.
 2 Q Anyone else from your side?
 3 A Mark Freeman.
 4 Q Yeah, I said Marty Freeman.
 5 A Mark Freeman.
 6 Q Who is Mark?
 7 A Mr. Freeman's son.
 8 Q Anyone else?
 9 A That's all.
 10 Q You spent two days down here?
 11 A Two different weekends.
 12 Q Two days in New Orleans?
 13 A Well, it was two weekends. Two consecutive
 14 weekends.
 15 Q In March.
 16 A Yes.
 17 Q Were you down for the whole weekend?
 18 A We came, I believe we came down on a Friday
 19 and either returned on a Saturday night or Sunday
 20 morning. I don't recall.
 21 Q Both times?
 22 A Both times. Similar situation.

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1 lead on it.
 2 Q Was everybody else present when you had
 3 these discussions or was it just the three of you?
 4 A Others may have been present. I just don't
 5 recall right now.
 6 Q You can't recall anybody else being
 7 present.
 8 A They may have been present. I just don't
 9 remember who -- I wasn't paying attention who was
 10 present or not. I was talking to Mike Eckstein in
 11 particular.
 12 Q Did you separate from the rest of the
 13 meeting specifically for the purpose of discussing the
 14 abandoned patent?
 15 A I may have, may not have. I just don't
 16 recall.
 17 Q Was there any discussion at the first
 18 weekend meeting about the abandoned patent?
 19 A Yes.
 20 Q What discussion was there?
 21 A I told them that we have to get this case
 22 revived. Again I told them that there were periods

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1 Q So did you meet on Friday and Saturday or
 2 you just met on Saturday?
 3 A We met on Saturday and there may have been
 4 some meetings on Friday. I just don't recall the
 5 details.
 6 Q Were all the people you just described
 7 there for both of those two weekends?
 8 A No. The first weekend was Marty Freeman,
 9 myself and Suzin Bailey. The second weekend was Marty
 10 Freeman, Mark Freeman and myself.
 11 Q Ms. Bailey was not at the second meeting.
 12 A That's correct.
 13 Q Was the purpose of both of those meetings
 14 the Cargill litigation?
 15 A Yes.
 16 Q During the course of those discussions
 17 regarding the Cargill litigation was there also some
 18 conversation about the abandoned patent?
 19 A Yes.
 20 Q Who participated in those discussions?
 21 A I recall clearly talking with Mike Eckstein
 22 and also Britton Sanderford and Mike Eckstein took the

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1 that we had to have this revived within. And if this
 2 -- that we had to move this as quickly as possible to
 3 get this revived. We didn't want to let it just
 4 linger.
 5 Q Did you at that time tell them when you had
 6 to act?
 7 A Yes.
 8 Q What did you tell them?
 9 A I told them that within the first six
 10 months or approximately within three months from that
 11 date. Because three months had passed, so it was
 12 three more months. We had to act or they would have
 13 to have a terminal disclaimer. Within the first six
 14 months of abandonment, which on the conservative, to
 15 be safe, three had passed and we were going into the
 16 second three months, they needed to act and they would
 17 have no loss of rights, no need for a terminal
 18 disclaimer.
 19 Q Did you explain to them at that time what a
 20 terminal disclaimer was?
 21 A Oh, yes.
 22 Q What is a terminal disclaimer?

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1 A A terminal disclaimer on an abandoned
2 patent application disclaims the period for which a
3 patent is abandoned. So the patentee or holder of the
4 patent doesn't get a benefit of an extended life on a
5 patent just by virtue of its being abandoned for a
6 period of time.

7 Q So you give up a certain portion of the
8 patent life; is that correct?

9 A Yes.

10 Q And that would be a consequence of having
11 it abandoned beyond November; is that correct?

12 A No. Beyond six months.

13 Q Beyond six months, whenever that ran.

14 A Yes.

15 Q Okay. What was their response?

16 A That's okay. They had higher -- they
17 clearly were more concerned with the James Arthur
18 litigation and this was not -- that was okay, because
19 a couple of months, you know, whatever it would be for
20 the period of the disclaimer, was not important to
21 them.

22 Q Did they say they didn't want to get the

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1 patent revived?

2 A No, they did not say that.

3 Q Did they tell you that it wasn't important
4 to them to get revived?

5 A No, they did not say that.

6 Q What did they tell you about the revival as
7 opposed to your impressions? What did they actually
8 say to you?

9 A They told me to hold off.

10 Q They told you to hold off doing anything?

11 A Yes.

12 Q Did they tell you how long they wanted you
13 to hold off?

14 A In March, no, they did not.

15 Q Did they ever tell you how long they wanted
16 you to hold off?

17 A Well, getting to the April meeting, I was
18 pushing to revive the case with Mike Eckstein and he
19 instructed me to hold off because some depositions
20 were coming up in the Arthur case.

21 Q Even in April, though, you were well before
22 the six-month period; is that right?

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1 A Yes.

2 Q How long did this discussion regarding the
3 abandoned patent take in the first weekend?

4 A Maybe ten minutes.

5 Q Other than the three, you, Britton and
6 Mike, you can't recall any other participants or
7 witnesses to this conversation, can you?

8 A Well, Marty Freeman and Suzin Bailey may
9 have been there, very well. I just don't recall.

10 Q I'm not asking you to guess. I'm asking if
1 you can recall as you sit here right now anybody else
2 who participated in that conversation.

3 A I don't recall. I don't recall Britton
4 being there for the whole conversation because it was
5 primarily with Mike Eckstein.

6 Q And your testimony is it took about ten
7 minutes?

8 A Yeah. Five minutes, ten minutes, at that
9 point.

0 Q Did you discuss it again at the next
1 weekend in March when you all met?

2 A Yes.

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1 Q How did that come up?

2 A I said, "Have you changed your mind? Can
3 we go forward?" They just said hold off.

4 Q Who was that conversation with?

5 A Mike Eckstein. He was making the
6 decisions.

7 Q Was anybody else involved in the discussion
8 other than the two of you?

9 A I don't recall.

10 Q Did you break away from the other meeting?

11 A Or the meeting may have broken away from
12 us. It may have been on a break between the meetings
13 or something of that nature.

14 Q In the second March conversation did you
15 remind him of when you had to file, by when you had to
16 file?

17 A I don't recall.

18 Q Now you don't have a specific date in your
19 interrogatories about when those discussions took
20 place, do you?

21 A When in March?

22 Q Yeah.

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1 A That is correct.
 2 Q In the second conversation in March did you
 3 remind Mr. Eckstein of the deadlines?
 4 A I don't recall at this point.
 5 Q Were you concerned at that point?
 6 A Oh, very much.
 7 Q Yet you didn't write any letters to them
 8 confirming any of the discussions you had had about
 9 letting this patent sit; is that right?
 10 A Oh, sure. Because he clearly understood
 11 what the situation was.
 12 Q And Mr. Sanderford, you didn't write any
 13 letters to Mr. Sanderford then.
 14 A That is correct.
 15 Q Or to Mr. Eckstein.
 16 A That is correct.
 17 Q Or to anybody else at Axonn.
 18 A That is correct.
 19 Q Despite this being a matter of high concern
 20 to you.
 21 A That is correct.
 22 Q Did Mr. Sanderford know in March of 1993

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1 Mr. Sanderford knew in this March time period that the
 2 patent was abandoned?
 3 A Because we mentioned it on the first visit.
 4 Q In March.
 5 A Oh, yes.
 6 Q To him.
 7 A Yes.
 8 Q In these conversations you had in March
 9 with Mr. Eckstein did you talk about other options you
 10 had other than getting Mr. Arthur's declaration?
 11 A In March? No.
 12 Q Did you ever tell Mr. Sanderford that
 13 Mr. Eckstein had instructed you not to proceed with
 14 the revival?
 15 A I may have.
 16 Q I'm not asking if you may have. I'm asking
 17 if you recall doing that.
 18 A I don't recall right now.
 19 Q Now your interrogatory answers refer to
 20 similar discussions in April and May of 1993 with
 21 Mr. Eckstein. Anything in addition to what you have
 22 already told me?

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1 that the patent was abandoned?
 2 A Oh, yes.
 3 Q How do you know that?
 4 A I remember talking to him about it being
 5 abandoned. You know, let's get it revived.
 6 Q So he was telling you to get it revived.
 7 A He didn't say let's get it revived. I was
 8 telling him let's get it revived.
 9 Q But he didn't tell you to get it revived?
 10 A No. Well, I was taking instructions from
 11 Mike Eckstein. He had told me -- basically Mike
 12 Eckstein became in charge.
 13 Q Did Mr. Sanderford tell you that Mike
 14 Eckstein was in charge?
 15 A Charge? Absolutely.
 16 Q He told you that, that Mike Eckstein is in
 17 charge of this?
 18 A No, because he is in charge of the James
 19 Arthur litigation and I was not being used in the
 20 James Arthur litigation and that the decisions
 21 concerning that were to be made by Mr. Eckstein.
 22 Q So my question was how do you know

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1 A Oh, yes.
 2 Q Tell me what you recall about those
 3 discussions.
 4 A In April of 1993 I wanted, I was pushing, I
 5 wanted to get this case revived. I wanted to get
 6 possibly a signature. He said he would work on
 7 getting a signature from James Arthur. But he said
 8 hold off doing anything for now because something
 9 about a deposition was coming up. And I'm not sure
 10 when, what, or whose deposition he was talking about.
 11 But he said he was holding off because of a
 12 deposition. I assume it was James Arthur's and/or
 13 Britton Sanderford's deposition.
 14 Q Did you tell him that you would hold off
 15 but that the deadline was approaching?
 16 A Oh, yes.
 17 Q When did you tell him the deadline was?
 18 A For unintentional -- without loss of
 19 rights, it would have been within, to be safe, it was
 20 coming up about May, that time.
 21 Q That they had to file by May.
 22 A Yes.

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1 Q Even though at that point there had been no
2 determination of abandonment; right?

3 A That is correct.

4 Q And what was his response to that?

5 A Hold off.

6 Q Again, you didn't confirm that in writing.

7 A That is correct.

8 Q And again, you didn't confirm that with
9 Mr. Sanderford.

10 A That's correct.

11 Q In fact you had no conversations with
12 Mr. Sanderford in April or May about this, did you?

13 A In April or May?

14 Q Correct.

15 A I don't recall having them with
16 Mr. Sanderford about that time.

17 Q What discussions did you have with
18 Mr. Eckstein?

19 A In response to sending the notice of
20 abandonment to Mr. Sanderford, I think this got
21 backwards, who called who, but I got a call about a
22 week to ten days later from Mr. Eckstein.

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A That is correct.

Q It's your testimony that about, what did
you say, about a week to ten days after that you
talked to Mr. Eckstein?

A Yes. It might be a few more days, but
something like that.

Q Within the next couple of weeks?

A Yes.

Q Do you know why you don't have a date for
that conversation but you did for the February 1st and
February 10th conversations?

A Well, the February 1st was queued in
because as I mentioned, I either looked at telephone
bills or I remember coming back, it was the first day
back from a trip, and that was on a Monday. February
10th on or about is based on the letter. It may have
been the 9th, 10th, or the 11th. It is based on the
letter of Michael Eckstein.

Q In that conversation did you discuss with
him what options there were?

MR. WOLBRETTE: Which conversation are we
talking about now?

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1 Q You mean Mr. Eckstein called you. You
2 didn't call him. That's what you meant by got
3 backwards.

4 A Yeah, I might have that backwards.

5 Q In the interrogatories you may have that
6 backwards.

7 A Yeah. But I may have called him in
8 response to him calling me. So it may be technically
9 correct. I'm not sure which way it went.

10 Q Do you recall when that was?

11 A About a week to ten days after I sent out
12 the notice of abandonment.

13 Q Let me show you a document that we will
14 mark for identification as P-31, bearing Bates number
15 N000149, dated May 10, 1993, a letter. Attached to it
16 is the notice of abandonment.

17 (The document referred to was
18 marked Plaintiff's Exhibit
19 No. 31 for identification.)

20 BY MR. USDIN:

21 Q Is that the letter you sent sending the
22 notice of abandonment?

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1 MR. USDIN: I'm sorry. Fair enough.

2 BY MR. USDIN:

3 Q The conversation you had with Mr. Eckstein
4 after the notice of abandonment was sent. Did you
5 discuss with Mr. Eckstein what options existed?

6 A At this time, no. It was my present sense
7 impression from the previous discussions he knew what
8 the options were.

9 Q By the way, is there any letter anywhere
10 that you have seen in which you set forth those
11 options?

12 A There is not.

13 Q Okay. Did you tell him anything about what
14 the timing had to be for taking any actions?

15 A I don't recall. In the May telephone call?

16 Q Right.

17 A I don't recall.

18 Q Tell me what you recall about that
19 discussion.

20 A Mr. Eckstein told me to hold off and not
21 revive the case for any reason. Do not proceed for
22 any reason. He did not want me to go forward. There

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1 was a motion for summary judgment that was coming up
2 which he said he was going to win. Then when the case
3 was over, then he would revive the case.

4 Q Did he tell you when the motion for summary
5 judgment was?

6 A June or July, but I don't know.

7 Q Did you tell him that that was going to be
8 beyond the deadline when they might lose some patent
9 rights?

10 A Yes.

11 Q You told him that in that conversation?

12 A He already knew from the previous
13 conversation.

14 Q Did you tell him that in that conversation?

15 A I don't recall.

16 Q Because that was the first time you talked
17 about the summary judgment; right?

18 A Yes.

19 Q In the May conversation.

20 A Yes. But at this point it didn't matter
21 because that period to be safe had passed, if you had
22 gone by the November date.

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1 met in June of 1993; correct?

2 A Correct.

3 Q And that was at Axonn in New Orleans?

4 A Yes.

5 Q What was the purpose of that trip?

6 A To discuss revival or what they could do
7 about -- excuse me. Not revival. But it was
8 concerning the abandoned patent application and the
9 patents that were issued.

10 Q Previously issued patents?

11 A Yes.

12 Q What was the discussion about previously
13 issued patents?

14 A Mr. Eckstein and Mr. Sanderford wanted to
15 take James Arthur's name off the patents.

16 Q And they asked you to come down to discuss
17 that?

18 A Yes.

19 Q Why did you have to come down to discuss
20 that?

21 A I was surprised. The meeting lasted about
22 an hour to two hours, maybe an hour and a half, and I

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1 Q And he told you to wait.

2 A Yes.

3 Q And you didn't write to him confirming
4 that.

5 A That's correct.

6 Q Nor to Mr. Sanderford.

7 A That is correct.

8 Q Nor to anyone else at Axonn.

9 A That is correct.

10 Q Nor did you talk to anyone at Axonn
11 confirming that.

12 A Well, I talked to Mr. Eckstein.

13 Q Anybody else?

14 A I don't recall.

15 Q You don't recall that, do you?

16 A Talking to anyone else? No, I do not.

17 Q Anybody else involved in discussion with
18 Mr. Eckstein after the notice of abandonment was
19 received? Did anybody participate in the telephone
20 call other than the two of you?

21 A I don't recall.

22 Q Now your interrogatory answers say you also

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1 thought it was -- to me, they solicited, they wanted
2 me to come down there. I didn't ask to come down to
3 do it. So did I have to go down and discuss that in
4 person? No. But they asked me to come down at their
5 request.

6 Q Any discussion in that meeting about
7 anything relating to the Cargill litigation?

8 A There was a previous discussion on Cargill
9 litigation regarding this patent, abandoned patent
10 application, and it may have continued in that
11 discussion too.

12 Q What was that discussion?

13 A Well, one of the issues on the James Arthur
14 litigation suit, which is what this concerned, the
15 James Arthur litigation -- it is the only day I really
16 gave them any consultation for about an hour or two
17 hours on the James Arthur litigation -- one of the
18 issues was, and I remember advising them on this early
19 in the game, around February 10 or so with my
20 telephone conference with Michael Eckstein, and it was
21 echoed also again in June, that if James Arthur were
22 to proceed, were to prevail in his litigation and set

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1 aside the assignment of his rights to Axonn, then
 2 James Arthur would become an owner of the patents with
 3 an undivided interest shared with Axonn. Okay? Then
 4 there is no duty of accounting if they had no
 5 contract. Therefore, with respect to the Cargill
 6 litigation for the patents that were issued, he could
 7 go and sell or assign, sell, assign or license his
 8 rights to Cargill and with respect to other licensees.
 9 If they had any, he could sell, assign, license his
 0 rights to the other licensees.

1 Q So what was your recommendation for action
 2 to be taken?

3 A Well, first off, on removing his name from
 4 the three patents, I told him I could not do that.
 5 James Arthur from what I recalled in 1988 and from
 6 Britton Sanderford's representations to me, that James
 7 Arthur was the key inventor, the most important
 8 inventor. I knew for at least those three issued
 9 patents and also for the patent that was pending, I
 0 told him I could not remove James Arthur's name from
 1 the patent application. I felt that it could not be
 2 done. It would be wrong because he was the true

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A He told me not to proceed.

Q Who told you that?

A They told me. Eckstein and Sanderford.

Q What did you tell them would be the
 consequence of inaction?

A Inaction is that if the case is not revived
 imminently, because now I'm getting concerned they are
 just letting the case go and the safe period would
 pass and we would not get the case revived, it is
 unintentional, that the case would not be revivable at
 all.

Q And they told you nonetheless they didn't
 want to do anything at that time?

A Do not proceed.

Q Okay. Anything else you recall about the
 June conversation?

A Oh, yes, I recall more. Britton Sanderford
 was trying to make a case why James Arthur was not an
 inventor by trying to say this is what Britton
 invented, this is what James invented. And it became
 clear to me that it was his position now or taken
 because of the James Arthur litigation and for no

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1 inventor.

2 They asked what other options did they have
 3 for reviving and having a patent without James
 4 Arthur's name on it. I said the only option I could
 5 see from that point on was if we revived the patent
 6 application just as a continuation, just revive it and
 7 file it as a continuation, and then if at the same
 8 time while that is pending file a continuation in part
 9 patent application with new matter and have in that
 10 new patent application claims for which James Arthur
 11 was clearly not an inventor, then you could proceed on
 12 the CIP without James Arthur as a co-inventor. But I
 13 said with respect to the patent that was pending, I
 14 said with the representation that had been made to the
 15 Patent Office that James Arthur was an inventor, I did
 16 not see any way that his name could be removed from
 17 the patent.

18 Q Who else was involved in this meeting other
 19 than Mr. Eckstein and Mr. Sanderford and yourself?

20 A I don't recall if anyone else was there.

21 Q What was the result of that discussion?
 22 What actions were decided upon, if any?

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1 other reason that now Britton was the inventor and
 2 James Arthur was not the inventor. But from the
 3 representations I remember from 1988, James Arthur and
 4 Britton Sanderford appeared to be among the best of
 5 buddies, the best of friends, and there was no
 6 hostility among them. And based on Mr. Sanderford's
 7 direction that James Arthur's name go first on the
 8 patent application because he was the lead inventor, I
 9 put his name first.

10 Q So that all relates to the discussion about
 11 whether you could remove Mr. Arthur's name or not.

12 A That is correct.

13 Q And you told them they could not.

14 A I did not see any way it could be done.

15 Q You told them they couldn't.

16 A That is correct.

17 Q What else do you recall about that
 18 discussion?

19 A Right now I don't recall anything else.

20 Q Did they ever again try and bring that up,
 21 the idea of removing Mr. Arthur's name?

22 A Yes.

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1 Q When was that?

2 A Well, in response to a meeting in July of
3 1993 -- there is a Sheraton in New Orleans by a long
4 bridge. Twenty Mile Bridge?

5 MR. WOLBRETTE: Causeway.

6 THE WITNESS: And we met with Cargill
7 during that meeting.

8 BY MR. USDIN:

9 Q You met with Cargill.

10 A Cargill, that is correct. We had a meeting
11 with Cargill. And during that meeting, during the
12 breaks or in between or after the meeting or sometime
13 during the meeting I remember talking again with
14 Eckstein because per Britton Sanderford's previous
15 instructions even as of June and more representations
16 he made, Michael Eckstein was in charge, he was to
17 make the calls.

18 Going back to the June meeting, Britton
19 made it -- I offered, "Do you want my assistance in
20 this James Arthur matter? It involves patents." And
21 so I offered. That was one of my recommendations. I
22 said, "Do you need a patent attorney?" His response

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1 was they had a Mr. Lund and a Mr. Eckstein handling
2 the case. Mr. Eckstein was handling the intellectual
3 property matters and since he was handling
4 intellectual property, there was no need for me to be
5 involved.

6 Q That was in June.

7 A That was in June.

8 Q Who told you that?

9 A Britton Sanderford.

10 Q And do you know whether Mr. Eckstein was a
11 member of the Patent Bar?

12 A No, as far as I know he is not. But many
13 attorneys I know handle intellectual property and are
14 knowledgeable about intellectual property although
15 they are not a member of the Patent Bar and they are
16 not knowledgeable of the Patent Office procedures and
17 processing of patent applications.

18 Q So going back then to the July
19 conversation.

20 A Yes.

21 Q This is the one at the Sheraton.

22 A Yes.

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1 Q Tell me what you can recall about that
2 discussion.

3 A Again I approached Mr. Eckstein since he
4 was in charge. I said, I told Mr. Eckstein, I said we
5 have to get this case revived. I said if we don't get
6 it revived by this August, I don't think we are ever
7 going to get it revived. I think it's -- I just --
8 August was a self-imposed deadline I now wanted to
9 have. I wanted to make a decision they are going to
10 revive this case or not. And that's what I told him.

11 Q What did he say?

12 A He told me hold off. He would get back to
13 me.

14 Q This was Eckstein or Sanderford or both?

15 A Eckstein now. Sanderford is not talking to
16 me about it. Eckstein is talking to me.

17 Q And you are the only two in the
18 conversation?

19 A Yes.

20 Q Did he say when he would get back to you?

21 A Well, he did. It was shortly, a couple of
22 days later. So it was August 3, 4, somewhere around

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1 there, maybe 2.

2 Q So the July meeting was the very end of
3 July?

4 A Oh, yeah. It was like the last weekend in
5 July. So it was within the next week.

6 Q What did he say in the August discussion?

7 A He said he wanted again to reconsider the
8 options I outlined for him in June, including the --
9 and is there anything I could do. And I checked
10 whatever. I told him what they were. He said can he
11 just have something in writing. I said I tell you
12 what. I will just send you a quickie mail fax
13 summarizing what they were at that time, and I sent
14 him one.

15 Q Let me show you a document that is marked
16 for identification as AAX100097 and 98, dated August
17 6th, 1993. We will mark this one as P-32.

18 (The document referred to was
19 marked Plaintiff's Exhibit
20 No. 32 for identification.)

21 BY MR. USDIN:

22 Q Is this the E-mail fax you sent him?

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1 A Yes, it is.
 2 Q According to you, this is reviewing the
 3 options?
 4 A Yes.
 5 MR. WOLBRETTE: Could I just ask about the
 6 document that you handed him? This is an Axonn
 7 document, correct, because it has an Axonn number on
 8 it?
 9 MR. USDIN: Correct.
 10 MR. WOLBRETTE: It says to Michael
 11 Eckstein. Did this come from Mr. Eckstein's file or
 12 Axonn's files?
 13 MR. USDIN: I don't know.
 14 MR. WOLBRETTE: Because there is some
 15 writing on it and I don't know whose writing it is.
 16 MR. USDIN: I don't know the answer to
 17 that.
 18 MR. WOLBRETTE: Okay.
 19 BY MR. USDIN:
 20 Q Do you know why a copy of this was not
 21 produced with yours?
 22 A It should have been. I don't know why it

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1 Q Did you do some research on it?
 2 A Yes, I did.
 3 Q Did you bill him for that?
 4 A No, I did not.
 5 Q And you didn't write up your time to him
 6 about that?
 7 A No. As a matter of fact, I did not bill
 8 him for all the telephone conferences during all of
 9 these times. And even when we met in June there was
 10 no bill for that even though I flew down there.
 11 Q Was that because it was related to Cargill?
 12 A I didn't see it as related to Cargill
 13 because it was related to the James Arthur lawsuit. I
 14 should have billed him. I may have missed it or
 15 something.
 16 Q It could have been because it was related
 17 to Cargill and not related to James Arthur.
 18 A The only issue related to Cargill was if
 19 they lost the James Arthur suit that there may have
 20 been a consequence. I just don't recall.
 21 Q Now walk me through this if you would.
 22 First of all, who is Marty?

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1 wasn't.
 2 MR. WOLBRETTE: Hold on a second.
 3 (Discussion off the record.)
 4 BY MR. USDIN:
 5 Q This is the fax you sent to Mr. Eckstein;
 6 correct?
 7 A That is correct.
 8 Q This is reviewing the options you had?
 9 A Yes.
 10 Q And it's your testimony that you had
 11 informed him of these options before; is that right?
 12 A That is correct.
 13 Q This references a telephone conference with
 14 the examiner. When did that happen?
 15 A On or about the date of this fax. It may
 16 have been a day or two before.
 17 Q Well, if you were reviewing things you had
 18 already told him, why did you have to have a telephone
 19 conference with the examiner?
 20 A I was trying to see if there were any other
 21 options. I could just not find in the manual, patent
 22 procedure, or anywhere else that might be open to me.

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1 A That would be Marty Freeman.
 2 Q Why was this addressed to Marty Freeman?
 3 A The name may have been put on it, but I
 4 believe it was not faxed to him. It may not have been
 5 faxed to him, but I don't know right now at this
 6 point.
 7 Q You can't think of any reason why this
 8 would be sent to him, can you?
 9 A That is correct. I don't think it was
 10 though. I believe that is just a typographical error.
 11 Q Now you say in the second sentence "I
 12 believe that we could revive the patent application
 13 that just went abandoned by paying a fee of \$585."
 14 What type of revival effort was that going to be?
 15 A That would have been unintentional.
 16 Q And you don't know under what provision
 17 that is; right?
 18 A Well, I know when I look at the rules. It
 19 is 137(a) or (b). Probably (b). But I always check
 20 the rules every time I quote these things.
 21 Q So that would be an unintentional. And you
 22 are saying with the revival -- are you referring to

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1 the revival that you get by paying a fee of \$585?

2 A Yes.

3 Q Is that what that refers to?

4 A Yes.

5 Q So that would be with the unintentional
6 revival; is that correct?

7 A That is correct.

8 Q You are saying since we cannot add Arthur's
9 signature, we can attempt to correct it with our own
10 affidavits. How were you going to do that?

11 A This is the disgruntled employee affidavits
12 basically.

13 Q Okay. And you say the case will then go to
14 the Solicitor --

15 A Yes.

16 Q -- who will contact James Arthur.

17 A Yes. At his last known address, which you
18 will find in the, when you are preparing to submit
19 this, that's correct.

20 Q This is the first time there is any writing
21 from you that refers to your approach; is that right?

22 A That is correct.

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1 Q "And delete his name in the CIP process."

2 A That is correct.

3 Q Is that contrary to what you had advised
4 them they could do in June?

5 A No. That's consistent with what I advised
6 them in June.

7 Q That they could just leave his name off.

8 A Well, it is more than that. You have to
9 have -- the new subject matter of the invention in the
10 claims has to be part of an invention of which James
11 Arthur was not an inventor. So I tell them that here.

12 Keep in mind that the inventors signing the
13 CIP declarations will be stating that they are the
14 true inventors of the CIP. In consequence, since they
15 are the true inventors and James Arthur did not sign,
16 he is not an inventor.

17 Q Were you telling them they had to change
18 anything in the invention before they could do that
19 though?

20 A This is not new matter. The new
21 specification, that would have to be added for the new
22 claims.

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1 Q And there is nothing in this letter that
2 you see that specifies that this is a reminder or
3 review of what you have told them before, is there?

4 A At that point in time, that's primarily
5 what I used E-mail faxes for.

6 Q Is there anything in this note, this fax,
7 that suggests to you that this was a reminder or
8 review of things you had told them before?

9 A I don't see anything.

10 Q And then you go on in the second paragraph
11 to say "While of this is ongoing" -- and I take it the
12 "this" you are referring to is the unintentional
13 revival?

14 A Yes.

15 Q -- "we can file a continuation in part, a
16 CIP, of the now pending patent application." Which
17 application are you referring to?

18 A This is the, we revived the patent
19 application of the AXNN-15, so that's now pending.

20 Q So the pending application would be the
21 revived patent application.

22 A That is correct.

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1 Q How does that relate then to the last
2 paragraph where you are talking about the alternative?
3 "Alternatively, we could file the petition to revive
4 and a file wrapper continuation, or FWC, or FWC CIP
5 and drop his name on the CIP. I suggest that if we
6 do, we ought to have claims that are nothing like the
7 claims we already have issued or pending."

8 A That is correct. That means that's the
9 same thing. I'm telling him they've got to be nothing
10 like the claims. Meaning in civil language that these
11 are not the claims that James Arthur is an inventor on
12 but the new claims of the new matter being added by
13 the CIP. Therefore, these claims are nothing like the
14 prior claims. These basically are on the new matter
15 added, that is the new technical disclosure added in
16 the CIP.

17 Q So these were the options then you were
18 telling them they had; correct?

19 A Well, based on discussions, these are what
20 we were down or they were down to in August.

21 Q You don't tell them by when, do you? You
22 don't give them a deadline in here, do you?

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1 A I did not put them in here, that's correct.

2 Q So when you sent this E-mail or this fax,
3 that was before you executed your declaration; right?

4 A Which declaration?

5 Q The declaration that we have looked at in
6 this case. The declaration you made to the Patent
7 Office about the reason the deadline was missed.

8 A That is correct. But the declaration was
9 only addressing that one day, the reason the deadline
0 was missed.

1 Q Is this the first telephone conference you
2 had had with the examiner at the Patent Office about
3 the abandoned application?

4 A To my recollection, yes.

5 Q Again, no notes of your conversation with
6 the examiner; is that correct?

7 A That is correct.

8 Q When you talk on the second page about
9 letting something drop before it goes to the
0 Solicitor, what are you talking about?

1 A File a petition to revive and the
2 continuation patent application. One of the options

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1 prosecute it any further. You could abandon that
2 patent application expressly if you so desired.
3 That's what I'm talking about here. And while that is
4 pending, you could file a continuation in part. And
5 the abandoned -- the advantage here is I was trying to
6 beat a deadline so this could be revived. You have
7 this pending and it gives them time to file the CIP,
8 which is the way they said they wanted to go.

9 Q So the deadline was important.

0 A The deadline was very important at this
1 time.

2 Q But you don't tell them what that is.

3 A I do tell them.

4 Q But not in this.

5 A Not in this, no.

6 Q After you sent this fax did you have any
7 more discussions with Mr. Eckstein or anyone else at
8 Axonn in August?

9 A I don't recall.

0 Q Do you recall any discussions with anyone
1 between August and October?

2 A Other than we discussed? I don't recall.

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1 was if they wanted to file a -- they had several
2 options. To file a continuation patent application.
3 They also had the option if they wanted to file the
4 petition, that is the -- I don't recall. I look at
5 this and I just don't recall.

6 Q You don't know what you meant about that in
7 the letter, huh?

8 A At that time I did. I don't know what I
9 meant now.

10 Q I'm asking you now do you recall what you
11 meant?

12 A I don't know what I meant now. Just a
13 minute.

14 Q Excuse me. Are you through?

15 A I'm not through.

16 Q Okay.

17 A This refreshes my memory to the point that
18 again they didn't want me filing something with James
19 Arthur's name as the inventor. And one of the
20 options, I was just trying to give them the options,
21 if you do this and you revive it as the inventor, you
22 can drop that patent application. You don't have to

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1 Q What have we discussed?

2 A We discussed Eckstein calling me at the
3 house and I asked him about reviving the case. His
4 attitude was no, he was more interested in the fee.

5 Q Well, he didn't say that.

6 A No. That was my present sense impression.
7 He wanted a piece of the fee.

8 Q Let me show you a document that I would
9 like to mark for identification as P-33 which is Bates
10 numbered N000147, dated October 11, 1993, which is the
11 cover sheet of a fax from Mr. Sanderford to you.

12 A Yes.

13 (The document referred to was
14 marked Plaintiff's Exhibit
15 No. 33 for identification.)

16 BY MR. USDIN:

17 Q Do you recall receiving this?

18 A Yes.

19 Q In this he asks you to outline the several
20 scenarios available to them.

21 A Yes.

22 Q And he asked you to send him a note to that

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1 effect; right?

2 A Yes.

3 Q Did you?

4 A No. I telephoned him and gave him the
5 options.

6 Q When was that telephone conversation?

7 A I don't recall. It was sometime in
8 October. And I don't recall who I talked to. But in
9 response to that telephone call they made a decision
10 instead of all of these other options, how to revive
11 it with James Arthur's signature.12 Q But was it your impression when you
13 received this that Mr. Sanderford was unaware of what
14 the several scenarios were that were available to
15 them?16 A Well, he may have been unaware, but I
17 remember also saying in that telephone conference they
18 were fully -- they were discussed with Mike Eckstein,
19 and since he was in charge of the intellectual
20 property, including the Arthur case, to talk to Mike
21 Eckstein.

22 Q With whom did you have that conversation?

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1 Q Let me show you the next document which is
2 dated October 11th, 1993 from you to Steve Fant. It
3 bears Bates number AAX100096. This will be P-34.4 (The document referred to was
5 marked Plaintiff's Exhibit
6 No. 34 for identification.)

7 BY MR. USDIN:

8 Q Okay?

9 A Yes.

10 Q It says "Furtherance to Britton's
11 memorandum dated October 1, 1993 (should be October
12 11, 1993)." What does that mean?13 A Maybe the one -- my copy was October 1 and
14 it should have been 11.

15 MR. WOLBRETTE: No, that's your copy.

16 THE WITNESS: Oh.

17 MR. WOLBRETTE: That is the copy we
18 produced. There was no production of that document
19 from Axonn.

20 MR. USDIN: Right.

21 THE WITNESS: Okay. Maybe I wrote it
22 wrong. There was a one at one point and it should be

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1 A I don't recall.

2 Q When?

3 A This was October 1993.

4 Q Do you remember when in October?

5 A I don't remember the exact date.

6 Q Did you take any notes of the conversation?

7 A No, I did not.

8 Q And you never did respond with anything
9 written to Mr. Sanderford's October 11th memo
10 requesting a note; is that right?

11 A That is correct.

12 Q Do you recall how long the discussion was?

13 A I do not.

14 Q Do you recall going through the pros and
15 cons as Mr. Sanderford talks about?16 A I recall telling him to talk to
17 Mr. Eckstein because he was informed of the pros and
18 cons in view of the patent application and in view of
19 the Arthur litigation so that he would be a better
20 person to discuss that. But I don't recall me doing
21 it myself. I was not knowledgeable of the Arthur
22 litigation.

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1 11. I remember referring to this date here.

2 BY MR. USDIN:

3 Q But why is it written that way first? Why
4 didn't you just correct it to say the 11th?5 A I probably just didn't proof it. When I
6 send an E-mail fax, as you can see, I'm not a very
7 good typist.8 Q This one also was not produced to us. Do
9 you know why?

10 A This?

11 Q Yes.

12 A E-mail faxes, about half the time I don't
13 even get a copy.

14 Q So you don't keep a record of that?

15 A We have no chron files. We have never had
16 chron files of E-mail or E-mail faxes that we use.

17 MR. WOLBRETTE: Can I ask a question?

18 MR. USDIN: Yes.

19 MR. WOLBRETTE: Is it possible then that
20 your response to Mr. Sanderford was via an E-mail fax?

21 THE WITNESS: It's possible.

22 BY MR. USDIN:

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1 Q Do you have any recollection of sending him
2 an E-mail fax when you just testified under oath that
3 you did it by phone as opposed to writing him a note?

4 A I may have done it by fax, too, because I
5 had a telephone conference with Mr. Eckstein that I
6 did something by E-mail fax.

7 Q Have you ever seen any such E-mail fax?

8 A Have I seen it?

9 Q Yeah.

0 A I may have. I just don't recall.

1 Q Do you have any recollection of having seen
2 it?

3 A I don't have any recollection of seeing it
4 or not seeing it. I very well could have sent it and
5 I just don't have a copy of it.

6 Q And your testimony before that you
7 responded by calling him, that was your best
8 recollection as you testified at that time; right,
9 Mr. Newman?

0 A I remember talking to somebody. I'm not
1 sure who it was. Somebody at Axonn.

2 Q You don't recall who or when though.

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October 20th asking you what the status of that was;
is that right?

A That is correct.

Q I am going to show you a document marked
for identification as P-35. The document bears Bates
number N000146.

A Yes, I remember this letter.

(The document referred to was
marked Plaintiff's Exhibit
No. 35 for identification.)

BY MR. USDIN:

Q Mr. Sanderford was asking you the status of
the paperwork.

A Yes.

Q And that was the Arthur declaration?

A Yes.

Q Showing you document AAX100095, which we
will mark for identification as P-36, that was your
response to Britton?

A Yes.

Q That is you were still in the process of
preparing the paperwork for the abandoned patent?

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1 A It may have been Britton. It may have been
2 Sanderford. It may have been Steve Fant. It may have
3 been Erin Pierce. I'm not sure who I talked to.

4 Q I'm asking you please don't guess. If you
5 remember, please tell me. Okay?

6 A Right.

7 Q What was this P-34 in reference to? What
8 were you telling Mr. Fant?

9 A At that time I don't recall other than the
10 document speaks for itself. I don't know. You are
11 talking four years later. I just don't recall what
12 this is now.

13 Q As a result of the discussions that you
14 referred to earlier in October of 1993, did that
15 result in a plan of action for revival of the patent?

16 A Yes.

17 Q The decision was made to attempt to get a
18 declaration executed by Mr. Arthur?

19 A Yes.

20 Q And that decision was made by whom?

21 A Mr. Axonn.

22 Q In fact Mr. Sanderford wrote to you on

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1 A That is correct.

2 Q And Suzin Bailey was working on it;
3 correct?

4 A Yes.

5 Q At this point you were communicating with
6 Mr. Sanderford, not Mr. Eckstein; right?

7 A That is correct.

8 Q Do you know why Mr. Eckstein was no longer
9 in the loop on this?

10 A I don't know.

11 MR. WOLBRETTE: Well, let me --

12 THE WITNESS: I don't know that he wasn't
13 in the loop either.

14 MR. WOLBRETTE: Thank you.

15 MR. USDIN: Good cue.

16 (The document referred to was
17 marked Plaintiff's Exhibit
18 No. 36 for identification.)

19 BY MR. USDIN:

20 Q Was Mr. Sanderford in charge at that point
21 or Mr. Eckstein?

22 A I don't know who was in charge.

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1 Q Suzin Bailey was the one handling the
2 preparation of the documents?

3 A That is correct.

4 Q That was under your instruction?

5 A That is correct.

6 Q Because at that point in the fall of 1993
7 she was not very familiar with patent matters, was
8 she?

9 A That is correct.

10 Q So she was under your supervision.

11 A Back up. She was familiar with patent
12 matters because she had worked for me over a year.
13 But in terms of prosecution, she was on a learning
14 curve. But she knew legal issues and how to do
15 research. So put that in perspective. This was a
16 very simple matter to prepare, these documents. She
17 was able to do it.

18 Q If they were simple, why did it take so
19 much time to do it, do you know?

20 A I don't know. Was there a weekend in there
21 or no? I'm not sure.

22 Q Let me show you a document marked for

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1 identification as P-37 which is a letter from you to
2 Britton enclosing a declaration. Is that the
3 paperwork that was being prepared?

4 A That is correct.

5 Q By the way, why were you having Ms. Bailey
6 handle this instead of you?

7 A She was working under my supervision to get
8 the materials prepared.

9 Q But this was a matter of great concern to
10 you; right?

11 A It sure was. But it is not unusual for me
12 to use an associate in my law firm to get things
13 prepared to assist me.

14 Q Under what proceeding were you planning on
15 filing?

16 A I was planning to file as unintentional
17 abandonment.

18 Q With all three declarants; correct?

19 A Yes.

20 Q Was there any consideration of any filing
21 under any other provisions of the CFR?

22 A At this time, no. It would not have been

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1 necessary.

2 Q Now you are quoting a fee of \$2,500; right?

3 A Right.

4 Q Why had that gone up so much from the \$585
5 that we talked about before?

6 A The \$585 was the Patent Office fee. This
7 fee included the Patent Office fee and there was some
8 discussion and they agreed and they sent this for that
9 purpose. They said that since I put so much time in
10 discussing this with them over the previous year to do
11 a fixed fee of \$2,500, for the work up to this point,
12 minus the Patent Office fee. So that's what we did.
13 We just fixed it at \$2,500.

14 Q With whom was that discussion?

15 A I don't recall now. Someone inside Axonn,
16 but it could have been Britton or Erin Pierce.
17 Usually Britton Sanderford discussed those, but I
18 don't recall the discussion. But that's where the
19 number came from for the letter.

20 Q So even though you said earlier you didn't
21 bill him for all of that, you did get paid through the
22 \$2,500 fee?

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1 A Essentially for all the discussions and
2 advice I rendered, we felt that was a fair and
3 equitable way to get paid.

4 Q Did you tell him how much time you had put
5 in?

6 A For time, no. I don't always bill by an
7 hourly basis.

8 Q Do you keep hourly records?

9 A Not always.

10 Q The third paragraph of the letter talks
11 about your advising them if the petition is not filed
12 within six months from the date of abandonment of the
13 application, then you had to have a terminal
14 disclaimer; right?

15 A Correct. So I'm telling him again what the
16 purpose of the terminal disclaimer was that was
17 enclosed with these documents.

18 Q But the letter doesn't say that you are
19 saying it again. The letter says be advised; right?

20 A That's right.

21 Q It says nothing that let me remind you.
22 You don't say that, do you?

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1 A It doesn't say that. I said be advised.
 2 Q Okay. Do you say what the dates are as it
 3 applies to these circumstances?
 4 A No. Because everybody knew at this point.
 5 They knew that we were rushing. That's why we were
 6 rushing in October, to beat the November 8 deadline if
 7 we could to be safe. That's why all of that fury of
 8 activity in October.
 9 Q And you tell them what will happen with the
 10 terminal disclaimer; correct?
 11 A Yes.
 12 Q This letter doesn't state when the deadline
 13 is; correct?
 14 A No. Because everybody knew. We were all
 15 working for it.
 16 Q But the letter doesn't state.
 17 A The letter doesn't state it, that's
 18 correct. But there may have been even an E-mail fax
 19 on that too. I just don't recall.
 20 Q But you don't recall it, do you?
 21 A I recall E-mail faxes being sent, but I
 22 don't have copies of them.

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1 (The documents referred to were
 2 marked Plaintiff's Exhibits No.
 3 37 and 38 for identification.)
 4 BY MR. USDIN:
 5 Q In response to this letter did you
 6 understand that it appeared that you were going to be
 7 able to get Mr. Arthur to sign the document needed?
 8 MR. WOLBRETTE: That he was or that
 9 Axonn --
 10 MR. USDIN: That he understood Axonn was
 11 going to be able to get it. And I'm referring to the
 12 second paragraph.
 13 THE WITNESS: Yes.
 14 BY MR. USDIN:
 15 Q Okay. This was slightly before the
 16 deadline for filing; correct?
 17 A That is correct.
 18 Q And did you call Mr. Eckstein and tell him
 19 about the deadline as soon as you received this on
 20 November 5?
 21 A Well, you see, I'm not sure if I received
 22 this on the 5th or not. I know it is dated that. But

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1 Q I'm going to ask you not to speculate. If
 2 you have a memory, then I think we all want to hear
 3 it. But if you are just going to try --
 4 MR. WOLBRETTE: I don't think he was
 5 speculating. He told you he recalls E-mail faxes
 6 being sent but he doesn't have copies of them. That's
 7 a fact, not speculation.
 8 BY MR. USDIN:
 9 Q Do you recall sending an E-mail fax that
 10 related to the deadline date of November 1993?
 11 A I can't recall if I did or did not at this
 12 point.
 13 Q Have you ever seen one?
 14 A I just don't recall.
 15 Q Do you recall seeing one as you have spent
 16 the last three days preparing for your deposition?
 17 A I have not found one.
 18 Q Okay. Let me show you a letter that's
 19 dated November 5th, 1993 bearing Bates number N136.
 20 I'm sorry. It starts on 135 with the cover sheet, and
 21 136 and 137. This will be P-38.
 22 A Okay.

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1 this would have come in my office late in the day and
 2 I may have been gone by Friday afternoon.
 3 Q You know that was a Friday?
 4 A Yes, because I have checked it on a
 5 calendar.
 6 Q In connection with preparing for the
 7 deposition?
 8 A That is correct.
 9 Q Did you call him on Monday then?
 10 A I don't recall if I did or did not.
 11 Q Or Tuesday?
 12 A I may have, or he may have called me.
 13 Q Do you recall doing that, Mr. Newman?
 14 A At this time I don't recall.
 15 Q In fact wasn't the next time you called him
 16 on or about November 15th, 1993? Let me show you a
 17 document bearing Bates number N000138 marked for
 18 identification as P-39. It starts off "In furtherance
 19 to our telephone conference on November 15th."
 20 A Right.
 21 Q Is this the letter that responds to Mr. --
 22 MR. WOLBRETTE: Excuse me. He said right.

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1 I don't know what he is saying right in response to.
 2 THE WITNESS: It says "In furtherance to
 3 our telephone conference on November 15th," right.
 4 MR. WOLBRETTE: Are you saying right,
 5 that's what the letter says?
 6 THE WITNESS: Right.
 7 MR. WOLBRETTE: Not in response to his
 8 previous question.
 9 THE WITNESS: Right.
 10 BY MR. USDIN:
 11 Q Does this letter refresh your recollection
 12 that you had a conversation with Mr. Eckstein on
 13 November 15th, 1993?
 14 A Yes.
 15 Q Do you recall any discussions with
 16 Mr. Eckstein between November 5th, 1993 and November
 17 15th, 1993?
 18 A I may have. I just don't recall at this
 19 time.
 20 Q You don't recall any; is that right?
 21 A Yeah, that's correct.
 22 Q Did you have any other written

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1 (The document referred to was
 2 marked Plaintiff's Exhibit
 3 No. 39 for identification.)
 4 THE WITNESS: What's the question again,
 5 please?
 6 BY MR. USDIN:
 7 Q Why did you wait 13 days to send this
 8 letter in response to Mr. Eckstein's November 5th
 9 letter?
 10 A I don't recall.
 11 Q Are your E-mails electronically stored on
 12 your hard drive?
 13 A I can't find them. They get deleted
 14 because we have to delete them.
 15 Q Even from the hard drive?
 16 A As far as I know. I don't know. I have no
 17 idea if there is a backup or not a backup. I have no
 18 idea.
 19 Q During this time period were you
 20 communicating with anyone else at Axonn?
 21 A Other than Britton Sanderford, Erin Pierce,
 22 Michael Eckstein and maybe one of the other assistants

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1 communications to Mr. Eckstein responding to his
 2 letter of November 5th, 1993?
 3 A I may have sent an E-mail fax in that
 4 response. I just don't recall. It may have gone out
 5 the next day, too.
 6 Q Okay. You don't have any recollection of
 7 that though, do you, Mr. Newman? You keep saying you
 8 may have sent an E-mail fax. I'm going to ask you to
 9 testify to what you recall.
 10 A I recall sending one but -- I recall
 11 sending one.
 12 Q In response to the November 5th one.
 13 A I don't know if it was in response, but I
 14 recall sending one about that time.
 15 Q Tell me what it said.
 16 A I don't recall at this point.
 17 Q You don't have any recollection what it
 18 related to; is that right?
 19 A Right. That is correct.
 20 Q Do you know why you didn't send the
 21 response that's dated November 18th for 13 days after
 22 Mr. Eckstein's letter?

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1 in the office, I can't recall anyone else.
 2 Q But you were in communication with
 3 Ms. Pierce; correct?
 4 A I'm not sure who I talked to during these
 5 telephone calls. I remember telephone calls, but I
 6 don't recall whose voice was on the other end.
 7 Q Let me show you a document that's been
 8 identified as AAX100092. It is a November 19th, '93
 9 letter from Erin Pierce to you. Attached to it is the
 10 fax confirmation data. This will be P-40.
 11 (The document referred to was
 12 marked Plaintiff's Exhibit
 13 No. 40 for identification.)
 14 BY MR. USDIN:
 15 Q Do you recall receiving that letter,
 16 Mr. Newman?
 17 A I don't recall this letter.
 18 Q Do you recall there coming a time when you
 19 received a communication from Ms. Pierce in which she
 20 expressed some frustration in leaving phone messages
 21 for you that you did not return?
 22 A No. Because I returned phone messages as a

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1 routine. That's why the letter is kind of surprising
 2 to me.
 3 Q You don't deny receiving it, do you?
 4 A I don't know that I did receive it or did
 5 not receive it. I just have not seen this letter
 6 before.
 7 Q Would that explain why you haven't produced
 8 it with your files?
 9 A It could be we never received it or got a
 0 copy of it.
 1 Q Is the information the fax information?
 2 Correct?
 3 A It could be. Yes.
 4 Q It could be or it is?
 5 A It is. Wait a minute. Yes, it is.
 6 Q Do you recall ever talking to Ms. Pierce in
 7 November of 1993? Do you have any recollections of
 8 any discussions with her?
 9 A I recall having discussions with her, but I
 0 don't recall the substance of the discussions.
 1 Q At this time you were proceeding under a
 2 course of action that would be a filing under 137(b);

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though; is that right? I'm showing you the document
 N000120 --
 A Yes.
 Q -- which we will mark for identification as
 P-42.
 A Yes.
 (The document referred to was
 marked Plaintiff's Exhibit
 No. 42 for identification.)
 BY MR. USDIN:
 Q And that's the cover letter for the
 enclosure; right?
 A Yes.
 Q So there was a three-day lapse between when
 you filed it and when you sent it; correct?
 A Three days. Six days; right?
 Q Is it six? What date do you have it being
 filed?
 A January 7th. Or is it --
 Q Oh, I'm sorry. Yes.
 A So three days, that's correct.
 Q Depending on when you signed it or when it

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1 correct?
 2 A That is correct.
 3 Q Did you advise anyone at Axonn regarding
 4 any other options they had for filing?
 5 A At this point, no, because 137(b) appeared
 6 to be the easiest route to revive the case.
 7 Q And that required a declaration from each
 8 of the three inventors; correct?
 9 A That is correct.
 10 Q I show you a document that we will mark for
 11 identification as P-41. It bears Bates number N000445
 12 and the following numbers. Is this the 137(b)
 13 application that you filed?
 14 A Yes.
 15 Q And it was filed on or about January 10th,
 16 1994?
 17 A That is correct.
 18 (The document referred to was
 19 marked Plaintiff's Exhibit
 20 No. 41 for identification.)
 21 BY MR. USDIN:
 22 Q Now this was sent to the client on the 13th

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1 was received, I guess.
 2 A Yeah. There may be a weekend in there.
 3 Who knows what else.
 4 Q You didn't check that calendar?
 5 A I didn't check that, no.
 6 Q So you sent it to him on the 13th.
 7 A Yes.
 8 Q And by him I mean to Axonn actually.
 9 Correct?
 10 A That is correct.
 11 Q That explains why on January 12th, 1994
 12 Mr. Sanderford is writing to you asking you whether
 13 the Patent Office has accepted the refiling?
 14 A That is correct.
 15 Q I'm going to mark this as Exhibit P-43,
 16 which is document N121.
 17 (The document referred to was
 18 marked Plaintiff's Exhibit
 19 No. 43 for identification.)
 20 BY MR. USDIN:
 21 Q Now the letter, do you recall receiving
 22 this letter?

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1 A I don't have a present recollection of it.
 2 Q Do you recall receiving a letter in which
 3 Mr. Sanderford refers to office action surprises?
 4 A I don't have a recollection of it, no.
 5 Q Do you recall having a discussion with
 6 Mr. Sanderford about any office action surprises?
 7 A No discussion about it. I don't recall one
 8 way -- we may have, we may not have. I don't recall.
 9 Q And you knew at that time that he was
 10 anxious to proceed with some other claims that he
 11 wanted to get going; right?
 12 A In January? I don't recall that I knew in
 13 January.
 14 Q When do you recall knowing?
 15 A I recall he was interested in going forward
 16 around March. That's my recollection.
 17 Q He says "I want to start applying for
 18 CIP's/Additional Claims." Does that refresh your
 19 recollection?
 20 A That is correct.
 21 Q In fact a few days later he wrote to you
 22 about giving you a sample of the added claims on

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1 choice, I'm not sure. But it was based on, as I
 2 recall it was based on if you wanted to proceed, I
 3 needed a retainer to go forward.
 4 Q Well, could he have continuations off of
 5 the abandoned patent until it had been revived?
 6 A Well, you could -- well, sure. Off the
 7 abandoned patent application. When the abandoned
 8 patent application is revived, the continuation patent
 9 application will have the co-pendency required, so you
 10 could proceed.
 11 Q But the prosecution of the continuation
 12 cannot proceed until the underlying patent is revived;
 13 correct?
 14 A Until the -- well, that's not true, because
 15 the continuation in part is basically a new patent
 16 application. It has new matter. He is trying to show
 17 here the new matter he wants to patent. That new
 18 matter in and of itself may be patentable,
 19 irrespective of the priority from a continuation.
 20 Q But if there is any relationship to the
 21 priority of the abandoned patent, then the
 22 continuation cannot proceed; right?

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1 January 17th, 1994, a document bearing Bates number
 2 N000119; is that right? That will be marked for
 3 identification as P-44.
 4 A Oh, yes, I remember this.
 5 (The document referred to was
 6 marked Plaintiff's Exhibit
 7 No. 44 for identification.)
 8 BY MR. USDIN:
 9 Q Do you recall him sending you some
 10 information about the claims he wanted to add?
 11 A That is correct.
 12 Q And that was in January 1994.
 13 A That is correct.
 14 Q But you really couldn't move forward with
 15 that until you got this other one revived; right?
 16 A Well, there was another issue. For
 17 authorization to proceed, I told him that -- because
 18 we worked with Axonn on a retainer basis. For us to
 19 start working on a new patent application, we required
 20 a retainer to start, you know, against the work we are
 21 going to do. And he just held off. In fact he had me
 22 file other patent applications. Perhaps a cost

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1 A No, it can proceed because the continuation
 2 is a new patent application. Maybe we are not
 3 communicating the same way. But it's -- the
 4 continuation is basically a new patent application.
 5 All of this is new matter. You are claiming the
 6 benefit of the priority from the abandoned case. Now
 7 if the abandoned case doesn't revive, you still have a
 8 patent application pending, and that may issue on its
 9 own right anyway. It is based on the new matter that
 10 he wants to enter in the patent application.
 11 Q But if there is a terminal disclaimer on
 12 the abandoned patent, it affects the continuation as
 13 well, doesn't it?
 14 A The continuation, but not a continuation in
 15 part. I'm talking about a continuation in part here,
 16 not a continuation.
 17 Q So that's all he was talking about; right?
 18 A I understand this to be a CIP because he
 19 wanted to add new matter to the patent application.
 20 So the terminal disclaimer will not necessarily apply
 21 to the CIP.
 22 Q Okay. The attempt to revive under 137(b)

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1 failed; correct?

2 A That is correct.

3 Q I'm showing you a letter from you dated
4 March 17th, 1994, it is document N000117, and a
5 decision dated March 14th, 1994 bearing Bates number
6 N000443, which we will mark sequentially as P-45 and
7 P-46.

8 A That is correct.

9 (The documents referred to were
10 marked Plaintiff's Exhibits No.
11 45 and 46 for identification.)

12 BY MR. USDIN:

13 Q This is what you sent when you got the
14 decision from the PTO; correct?

15 A That is correct.

16 Q And it was denied as having been filed more
17 than a year after the date of abandonment; right?

18 A That is correct.

19 Q The decision gave you an option that you
20 refer to in your letter of going under 137(a)?

21 A That is correct.

22 Q And you state in your letter in the third

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1 about the failure to submit the declaration in
2 February of 1993; correct?

3 A Where are you talking about?

4 Q The third paragraph.

5 A That is correct.

6 Q This was something that was in your files,
7 wasn't it, when you did your declaration?

8 A That is correct.

9 Q And you looked at this before you did your
0 declaration?

1 A I don't recall if I did or did not.

2 Q But you went through your file, didn't you?
3 Didn't you tell me that?

4 A I believe I did.

5 Q Okay.

6 A But what this does not address is the fact
7 that in the declaration that you are talking about, in
8 the declaration you are talking about, I'm stating
9 that I missed a date because of certain reasons that
0 happened in my office. What this does not address is
1 that I did not know that I had already apprised Axonn
2 of those dates and they are fully informed and that

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1 paragraph that the application went abandoned because
2 of your need to submit the declaration of James D.
3 Arthur who refused to sign; right?

4 A That is correct.

5 Q And that's why it went abandoned; right?

6 A We didn't timely file it. That is correct.

7 Now understand at that time, up to that time I
8 believed that we actually had to February to get it
9 filed although we were working towards a November
10 date. But they knew that if we didn't -- to be safe.
11 And if we didn't meet the November date, there was a
12 risk. And this is a result of that risk.

13 Q Let me take you back to the third
14 paragraph. The application went abandoned as a result
15 of the failure to file in February; correct?

16 A It went abandoned for not filing a response
17 in February, that is correct.

18 Q And everything after that was an attempt to
19 revive it.

20 A That's correct.

21 Q So when you are talking about that the
22 subject application went abandoned, you are talking

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1 they were making a conscious decision on the matter
2 which I was unaware of. And this still does not
3 address the issue of me missing the dates in my file,
4 that is correct.

5 Q All it says is that you didn't submit the
6 necessary document.

7 A I didn't submit the documents, that's
8 correct. It does not address what happened in
9 February of 1993.

10 Q Well, wait a minute. Let me make sure we
11 are clear on this. The failure to submit the
12 declaration was the failure in February of 1993;
13 correct?

14 A That is correct.

15 Q Okay. Now they cited to you a case in
16 here, in re S.

17 A Yes.

18 Q Did you look that case up and read it?

19 A Yes.

20 Q After you got this?

21 A Yes.

22 Q Did you copy it for the file?

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1 A I may have. I don't recall if I did or did
2 not.

3 Q It wasn't in the file, was it?

4 A We normally don't put them in the files.
5 We just look in the books and that's it.

6 Q The March 14th decision that's in P-46
7 instructed you that you would have to file a new
8 declaration; correct?

9 A That is correct.

10 Q Now when you wrote to the client in this
11 March 17th letter, that is P-45, did you advise them
12 of any other options they had other than proceeding
13 under 137(a)?

14 A No, I don't recall if I did or did not at
15 this time.

16 Q Do you recall discussing with anyone what
17 other options they had other than 137(a)?

18 A Yes. Because I thought the ruling was
19 wrong because of the February date and that it was
20 timely filed. But I thought petitioning that ruling
21 is kind of like petitioning, initially I thought
22 petitioning city hall, and they are the judge and

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1 appeal or ask for a review of what you say is wrong?

2 A On this case, no.

3 Q Now your letter also refers to the terminal
4 disclaimer; right? That was going to happen.

5 A Yes.

6 Q That was going to happen. Assuming it was
7 revived, there would be a terminal disclaimer;
8 correct?

9 A Yes, that's correct.

10 Q Now following the decision from the U.S.
11 PTO, you proceeded to prepare a petition under 137(a)?

12 A Yes.

13 Q There was also some discussion about extra
14 claims during that time period; right? Additional
15 claims that Mr. Sanderford was interested in?

16 A Well, this is the new matter for the CIP.

17 Q Uh-huh.

18 A Yes.

19 Q I'm showing you a document dated April
20 11th, 1994 bearing Bates number AAX100473. Did you
21 ever explain to Axonn that it was not necessary to get
22 the revival before proceeding with the extra claims?

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1 jury, that it was -- initially when I had this it was
2 my judgment that was going to be a futile effort. But
3 I also thought it was unfair because of the way the
4 Patent Office is set up that -- was the date of
5 abandonment in November or was it the end of February
6 when the patent application was supposedly pending or
7 was it not pending? It just wasn't clear in the
8 rules.

9 Q But you did have a right of appeal or ask
10 for review of this determination, didn't you, of the
11 March 14th determination, if you thought it was wrong?

12 A That's correct.

13 Q And you didn't pursue that, did you?

14 A Well, we ultimately did.

15 Q When?

16 A In my reply brief we submitted material.
17 We submitted material from Mr. Kuesters' brief in
18 August of 1995.

19 Q Okay. That was when Mr. Kuesters filed.

20 A That's when Mr. Kuesters filed.

21 Q In anything that you filed on behalf of
22 Axonn as the prosecuting attorney did you ever try to

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1 A I believe so, yes.

2 Q To whom?

3 A It would have been to Britton Sanderford.

4 Q Do you recall the conversation?

5 A I recall asking for a retainer to proceed
6 so we could do that and he didn't want to advance the
7 money. He wanted us to work on other -- he had a
8 priority of other patents we were working on for his
9 other company Sanconix and that took a priority over
10 this matter at that point in time. So we did two
11 other patent applications for him at this point in
12 time.

13 Q So you didn't proceed with the extra 50
14 claims at that point that's referred to in the April
15 11, 1994 letter.

16 A I don't know what the extra 50 claims are
17 because I don't know that I have those extra 50
18 claims.

19 Q Did you call anybody and say you didn't
20 know what the extra 50 claims were?

21 A I just don't recall now.

22 Q Did you write anybody and say you didn't

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1 know what extra 50 claims they were referring to?

2 A I don't recall.

3 Q Then after going through some drafts you
4 filed a 137(a) petition; correct?

5 A That is correct.

6 Q I'm showing you a document that we will
7 mark for identification as P-48. The April 11, 1994
8 letter should be marked P-47. Then P-48 is your
9 transmittal letter of the 137(a) and P-49 is the
0 application.

1 A That is correct.

2 (The documents referred to were
3 marked Plaintiff's Exhibits No.
4 47, 48 and 49 for identification.)

5 MR. USDIN: Let's take a short break.
6 (Brief recess.)

7 MR. WOLBRETTE: Let me say something on the
8 record. There was one question and answer that I
9 think from what I was hearing there may have been a
0 miscommunication on. I don't know, it could be my
1 error. I thought I heard you ask him whether based on
2 the November 5th, 1993 letter from Eckstein he thought

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1 Axonn?

2 A 49? What's 48?

3 Q 48 and 49.

4 A Yes.

5 Q Okay. And it included a terminal
6 disclaimer?

7 A Yes.

8 Q And the basis for the petition under the
9 137(a) was the complications with Mr. Arthur?

10 A Yes.

11 Q Though no other complications were cited?

12 A Well, from recollection I remember that,
13 but I don't know what else is in here at this point.
14 You know, from all these documents. You want me to
15 sit here and read them?

16 Q Do you recall any as you sit here today?

17 A I don't recall anything else.

18 Q And that petition was denied; is that
19 correct?

20 A That is correct.

21 Q It was dismissed I should say.

22 A Yes.

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1 Arthur was ready to sign or words to that effect. I
2 thought he said yes. And he was reading the letter.
3 I think he missed the question. And you know, you can
4 go back and ask him or I will ask him at the end. But
5 I think there was a miscommunication.

6 MR. USDIN: I will let you do what you want
7 on that. The question and answer speak for
8 themselves.

9 MR. WOLBRETTE: And the letter speaks for
10 itself. My concern is that the content of the letter
11 is obviously contrary to the answer given to that
12 question and that's why I thought it was probably a
13 miscommunication. I just wanted to bring it to your
14 attention.

15 MR. USDIN: Okay.

16 MR. WOLBRETTE: Kathleen's notes are
17 different from what I heard. I don't know. As I say,
18 I may have just not heard correctly.

19 BY MR. USDIN:

20 Q I'm not sure if we did this before the
21 break, but P-48 and P-49 are the 137(a) application
22 and cover letter, correct, that you filed on behalf of

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1 Q Showing you a document we will mark for
2 identification as P-50, it says it was mailed July
3 14th, 1994 from the Petitions Office of the Department
4 of Commerce. It states that the 137(a) petition was
5 dismissed; correct?

6 A Correct.

7 Q And the reason it gave was because there
8 was not an adequate verified showing of the cause of
9 unavoidable delay; correct? In the second paragraph?

10 A By an adequate verified showing of the
11 cause of unavoidable delay. That's what it says, yes.

12 Q And the explanation in the fifth paragraph
13 is that it needed the declaration signed by all three
14 applicants; correct?

15 A That is correct.

16 Q Why did you not submit one signed by all
17 three applicants at that time in connection with the
18 137(a) petition?

19 MR. WOLBRETTE: At which time? Are you
20 talking about the one that was filed prior to July
21 14th?

22 MR. USDIN: I'm talking about the 137(a)

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1 petition that was dismissed by this office action.

2 BY MR. USDIN:

3 Q Why were there not declarations signed by
4 all three?

5 A Well, there was a declaration signed by
6 Britton Sanderford. Then he should have been -- it
7 was my judgment at the time that that was prepared
8 that he was sufficient based on the research I had
9 done.

10 Q What research had you done?

11 A Well, Suzin Bailey and I had looked it over
12 and there was no specification that said all
13 inventors. Britton Sanderford was president of the
14 assignee. That is the party of interest. They were
15 the owner of the patent application. Therefore, he
16 should have been sufficient to have made the showing
17 of what the problem was, the unavoidable delay.

18 Q And the Patent Office didn't agree with
19 you?

20 A They didn't agree.

21 Q Did you consider having all three sign?

22 A Initially?

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1 Q -- with respect to this particular
2 petition?

3 A Yes.

4 Q Do you recall that it related to the number
5 of declarants that were needed?

6 A I don't recall that.

7 Q At that time Mr. Arthur was cooperating;
8 right?

9 A Yes.

10 Q Now after you received this dismissal what
11 options did you tell Axonn it had?

12 A Well, let's get Arthur's signature and the
13 other inventors and let's just follow through in
14 response to what the Patent Office said.

15 (The document referred to was
16 marked Plaintiff's Exhibit
17 No. 50 for identification.)

18 BY MR. USDIN:

19 Q Showing you a letter dated July 20th, 1994
20 bearing Bates number N000079 from you to Britton and
21 Erin, you explain what that dismissal was based on;
22 correct?

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1 Q In connection with the 137(a) filing.

2 A Well, in response to this, yes.

3 Q No, in connection with the 137(a) filing in
4 May of 1994. Prior to making that filing did you
5 consider having all three inventors sign the
6 declaration?

7 A I don't recall.

8 Q Do you recall any discussions with anyone
9 about that?

10 A About that? I don't recall.

11 Q Did you perform any actual legal research
12 or did you have Ms. Bailey perform any legal research
13 on that issue?

14 A Ms. Bailey performed legal research.

15 Q Did she perform legal research on the issue
16 of whether the declarations of all three inventors
17 would be required under these circumstances?

18 A At this time I don't recall what the
19 research was on.

20 Q Do you recall her doing any research at
21 this time --

22 A Yes.

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1 A Yes, that's correct.

2 Q You tell them they have two months to
3 request reconsideration through verified statements
4 signed by Arthur and Rouquette; correct?

5 A That is correct.

6 Q And that has to state that the declaration
7 was unavoidable?

8 A That is correct.

9 Q That was the option you recommended at tha
10 time.

11 A Yes.

12 Q And there were no other options that you
13 recommended at that time.

14 A At that time, no. That's correct.

15 Q And Ms. Bailey worked with you on this?

16 A Yes.

17 Q Under your supervision; is that correct?

18 A That is correct.

19 Q You were responsible.

20 A Yes.

21 (The document referred to was
22 marked Plaintiff's Exhibit

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1 No. 51 for identification.)
 2 BY MR. USDIN:
 3 Q And then on or around September 15th, 1994
 4 you filed a renewed petition under 137(a); correct?
 5 A That is correct.
 6 Q I believe this is P-52. P-52 will be the
 7 cover letter to Britton and Erin of the renewed
 8 petition. And P-53 will be the cover letter and
 9 attachment and the filing of the renewed petition
 10 under 137(a). Is that correct?
 11 A That is correct.
 12 (The documents referred to were
 13 marked Plaintiff's Exhibits No.
 14 52 and 53 for identification.)
 15 MR. USDIN: For the record, P-52 starts
 16 with Bates number N000047 and P-53 is AAX100316 and
 17 numbers following.
 18 BY MR. USDIN:
 19 Q And the basis of that petition continued to
 20 be the complications with Mr. Arthur; right?
 21 A That is correct.
 22 Q That is what you represented to the Patent

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1 know?
 2 A This?
 3 Q Yes.
 4 A At least by mail. It may have been sent by
 5 fax too, I don't know. It includes all the -- yeah.
 6 These are -- yeah, I can't tell if it was sent by fax.
 7 It may have been. I don't know.
 8 Q You resigned because of what you perceived
 9 to be a conflict of interest as a result of the
 10 termination of your relationship relating to the
 1 Cargill case; correct?
 2 A That is correct.
 3 Q Was that the only reason you resigned?
 4 A That is the only reason.
 5 Q Were there any other conflicts of interest
 6 that you had that led you to resign?
 7 A No.
 8 Q Showing you a list of patents that you
 9 produced to us in your discovery, which we will mark
 0 for identification as P-55, this is a list of patents
 1 that you prepared?
 2 A Yes.

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1 Office; correct?
 2 A That was my understanding from the client.
 3 That is correct.
 4 Q There were no other justifications
 5 provided, were there?
 6 A At that time, no.
 7 Q Before the PTO acted upon your renewed
 8 petition under 137(a) you withdrew --
 9 A That is correct.
 10 Q -- from representation of Axonn; correct?
 11 A That is correct.
 12 Q Showing you a letter dated October 4th,
 13 1994, which will be P-54, this is the letter in which
 14 you informed Mr. Sanderford of your resignation;
 15 correct?
 16 A Yes, that is correct.
 17 Q And P-54 is N46.
 18 (The document referred to was
 19 marked Plaintiff's Exhibit
 20 No. 54 for identification.)
 21 BY MR. USDIN:
 22 Q Was this sent by mail or by fax or do you

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1 Q Can you describe what it is a list of?
 2 A These are a list of patents that had some
 3 pendency of prosecution even if it was waiting for an
 4 issue fee to be paid or after an issue fee. But
 5 patents that issued roughly after the fall of 1992 and
 6 that were prosecuted up to fall of 1994 but may have
 7 issued even after that date.
 8 Q And they are all patents that you worked
 9 on?
 10 A No. No, these are related to radio waves
 11 and spread spectrum technology.
 12 MS. MANNING: Wait. You asked him whether
 13 the patents are patents that he worked on?
 14 MR. USDIN: I'm asking what the list was
 15 and he said it was a list and he gave a date. I said
 16 these are all patents he worked on, and he said no.
 17 MS. MANNING: I'm sorry, I misunderstood
 18 the question.
 19 MR. USDIN: Right. That's what I was
 20 asking.
 21 THE WITNESS: Right.
 22 BY MR. USDIN:

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1 Q Do any of these predate the filings you did
2 for Axonn?

3 A With respect -- what case in Axonn and
4 which one?

5 Q Well, the original.

6 A The original patent application? I don't
7 know if they do or not.

8 Q Do any of the patents on this list have
9 anything to do with the reason that you withdrew from
10 representation of Axonn?

11 A No, not at all.

12 Q Okay.

13 (The document referred to was
14 marked Plaintiff's Exhibit
15 No. 55 for identification.)

16 THE WITNESS: Excuse me. Did you ask me
17 what were the only reasons I withdrew or just were
18 these patents the reasons?

19 BY MR. USDIN:

20 Q Well, first I asked you whether -- do you
21 want to consult?

22 MR. WOLBRETTE: I just mentioned to him --

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1 MR. USDIN: Do you want to go off?

2 MR. WOLBRETTE: No, you can stay on. You
3 asked him a question about basically was the reason he
4 withdrew the conflict of interest because of the
5 problems with his agreement ending their relationship
6 with Axonn in the Cargill case.

7 MR. USDIN: Right.

8 MR. WOLBRETTE: I mentioned to him I
9 thought he had also filed the suit at that time and
10 that was also part of the conflict of interest.

11 BY MR. USDIN:

12 Q Let me ask. The suit that you filed
13 related to the termination of your relationship, of
14 your representation relating to the Cargill
15 litigation; correct?

16 A That is correct. Because we had -- yeah,
17 that is correct.

18 Q When did you file the suit, do you recall?

19 A It was either October or November. I'm not
20 sure.

21 Q So at the time you withdrew you hadn't
22 filed it yet?

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1 A It had not yet been filed, that's correct.

2 Q I'm showing you a document marked for
3 identification as P-56, bearing Bates number N001361.
4 This is your withdrawal of appearance?

5 A That is correct.

6 Q This was filed in the Patent Office;
7 correct?

8 A That is correct.

9 Q And this bears the same date as your
10 letter, was filed contemporaneously with your letter?

11 A Yes.

12 Q Had you had any discussions with
13 Mr. Sanderford or anyone else at Axonn in the period
14 immediately prior to October 4th in which you told
15 them you were going to take this action?

16 A I don't recall.

17 Q You don't recall any such discussions, do
18 you?

19 A That is correct.

20 (The document referred to was
21 marked Plaintiff's Exhibit
22 No. 56 for identification.)

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1 BY MR. USDIN:

2 Q Now after you withdrew from representation
3 you did become aware at some point, though, that the
4 PTO rejected the 137(a) petition; correct?

5 A That is correct.

6 Q Showing you a document that previously was
7 identified in an earlier deposition as P-10, it is a
8 November 30th, 1994 date stamped decision. That's the
9 decision denying the 137(a) petition?

10 A Yes.

11 Q Looking at the fourth paragraph, they did
12 that because they determined that there had not been
13 an adequate verified showing of the cause of the
14 unavoidable delay?

15 A Yes.

16 Q And they specifically determined that
17 Arthur's refusal to cooperate was not unavoidable;
18 right? If you want to read that, take your time and
19 go ahead and do that.

20 A Yes.

21 Q And they specifically pointed out options
22 that the remaining inventors other than Mr. Arthur

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1 could have followed but which were not followed;
2 right?

3 A Yeah. Those could not be followed. That's
4 correct. Those are the ones that the client wouldn't
5 allow me to pursue. That's correct.

6 Q But the decision says that they could have
7 followed them but they did not.

8 A Yes.

9 Q And the only evidence that you know that
10 supports your version of you telling the client what
1 these options are is your memory; right? No documents
2 confirming it? No letters? No notes?

3 A Well, I think it's more than the memory. I
4 think also some of the E-mail faxes in August
5 verifies, is consistent with what was going on, and I
6 think the actions with the lawsuit and how they were
7 behaving is consistent with what was going on.

8 Q August of what year?

9 A Of 1993.

10 Q What about with respect to discussions of
1 those options at any time prior to that? Is there any
2 written evidence that you are aware of that supports

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1 delay in prosecution.

2 A I did. That's just the opposite. I did.
3 That's correct. The answer is I did.

4 Q When did you tell them that?

5 A This was the whole bit about when we were
6 trying to revive and telling people that leaving the
7 case abandoned is not proper. We have to get the case
8 revived. My discussions with Mike Eckstein. This is
9 what that was about. We have to get this case
10 revived. It is not supposed to be abandoned. It is
11 not supposed to stay abandoned.

12 Q Was that after the February 18th filing
13 date?

14 A Yes.

15 Q Now after your withdrawal and the decision
16 by the U.S. PTO --

17 A And --

18 MR. USDIN: For the record --

19 THE WITNESS: Just a minute. Back up on
20 that question.

21 MR. USDIN: I have asked it. I'm going to
22 move on.

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1 those options being disclosed and discussed with the
2 client?

3 A No, not that I can recall.

4 Q In fact the PTO specifically stated that
5 refusal of one inventor to cooperate did not justify a
6 delay in prosecution.

7 A That is correct.

8 Q And that's something you had never told
9 Axonn, is it?

10 MR. WOLBRETTE: Are you referring to the
11 other inventors could have filed the disgruntled
12 employee affidavit? Are you asking him if he never
13 told them that? I think he has testified about ten
14 times today that he in fact did tell them that.

15 MR. USDIN: No. I'm asking did he ever
16 tell Axonn that the refusal of one inventor to
17 cooperate did not justify a delay in prosecution.

18 THE WITNESS: That is correct. What is the
19 question? Wait a minute. You are saying --

20 BY MR. USDIN:

21 Q You did not ever tell Axonn that the
22 refusal of one inventor to cooperate doesn't justify a

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1 MR. WOLBRETTE: No, he wants to reply
2 further.

3 MR. USDIN: For the record, and so there is
4 no mistake, Mr. Wolbrette has put his head in his
5 hands with a sigh and now Mr. Newman is wanting to
6 amend his answer.

7 MR. WOLBRETTE: I have done that because we
8 have given answers and produced documents that show
9 that exactly what you are asking about is what is
10 discussed, and you know it, we know it. And
11 Mr. Newman wants to clarify his answer now.

12 THE WITNESS: Now you are saying only after
13 -- the question I'm understanding is you are focusing
14 after the March it was discussed again, in the March
15 and the other meetings.

16 BY MR. USDIN:

17 Q Yeah. But I'm asking about before.

18 A Oh, about before?

19 Q I'm asking about before February 18th,
20 1993.

21 A Oh, okay. Yes, that was discussed.

22 Q Okay. When?

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1 A That was with the February, on or around
2 February 10 telephone conference with Mike Eckstein
3 and also -- and I don't recall who it could have been.
4 Not could have been. It was discussed during the
5 February 10 meeting, February 1, 1993 meeting,
6 telephone, with Mike Eckstein and Britton Sanderford.

7 Q In that conversation you told them you are
8 testifying here under oath that the refusal of one
9 inventor to cooperate did not justify a delay in
10 prosecution.

11 MR. WOLBRETTE: Object to the form of the
12 question. Counsel, you have referred to perjury about
13 16 times or so. Maybe that's an exaggeration, but a
14 lot.

15 MR. USDIN: I think it is.

16 MR. WOLBRETTE: That's absolutely improper.
17 You know it is totally improper to suggest that kind
18 of thing in a question. I object to it.

19 MR. USDIN: I don't usually do that, but
20 the only reason I'm doing that is because we have a
21 declaration that is under penalty of perjury and he is
22 now saying there are things in it that are incorrect.

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1 Q Are you going to answer the question,
2 please?

3 A The answer is yes, because this was the
4 advice that -- wait a minute. Hold on. Ask the
5 question again. I'm so confused right now with all
6 the discussion going back and forth.

7 Q Prior to February 18th, 1993 did you tell
8 Axonn or anyone at Axonn that the refusal of one
9 inventor to cooperate did not justify a delay in
10 prosecution?

11 A Yes. As best my recollection, I believe.
12 The best of my recollection, yes. I didn't use those
13 words, but yes, that was discussed.

14 Q Did you tell them that you were certain
15 that that was the case or that there was a risk that
16 that might happen or that it might be unintentional?

17 A There are too many pronouns in your
18 question again. Certain what's the case?

19 Q Did you tell Axonn that the refusal of one
20 inventor to cooperate did not justify a delay in
21 prosecution and that that's what would be decided or
22 that it might be considered an unintentional

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1 So I want to make sure --

2 MR. WOLBRETTE: It is obvious that your
3 client withheld information that allowed him to give
4 that.

5 MR. USDIN: A judge will decide that. The
6 only reason I'm making the point --

7 MR. WOLBRETTE: You don't need to make the
8 point. He understands he is under oath. You don't
9 need to --

10 MR. USDIN: That he understands --

11 MR. WOLBRETTE: You don't need to continue
12 to say that.

13 MR. USDIN: That he understands that both
14 the declaration and this proceeding are under oath.

15 MR. WOLBRETTE: Oh, come on. You don't
16 think he understands this is under oath? Really,
17 please. Come on. Get on with it. You are playing
18 games.

19 MR. USDIN: No, I'm not.

20 MR. WOLBRETTE: Yes, sir, you are. Let's
21 go.

22 BY MR. USDIN:

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1 abandonment if that's the reason they abandoned?

2 A Unintentional abandonment.

3 Q Now following your withdrawal and the
4 decision of the U.S. PTO, the abandoned application
5 was taken over by Mr. Kuesters; is that correct?

6 A That's correct.

7 Q He requested permission from one of your
8 attorneys, Mr. Herman, to communicate with you in an
9 effort to revive the patent; is that correct?

10 A Yes.

11 Q And he did before he filed anything.

12 A Yes.

13 Q In fact he sent you a draft; correct? I'm
14 showing you a document starting with Bates number
15 N000024 which we will mark for identification as P-57.
16 It is a letter from Mr. Kuesters to Mr. Newman dated
17 April 28th, 1995.

18 MR. WOLBRETTE: Before we do that, let's
19 clarify on the record that the attorney was
20 representing Mr. Newman in his fee case involving
21 Cargill, not in this case or any other malpractice
22 case, and that the existence of the malpractice case

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1 was withheld from Mr. Newman. If you want Mr. Newman
2 to testify to that, he will be happy to. But I don't
3 want anybody reading this to think that Mr. Herman was
4 representing him in this case.

5 MR. USDIN: That's correct. He was not
6 representing him in this case.

7 (The document referred to was
8 marked Plaintiff's Exhibit
9 No. 57 for identification.)

10 THE WITNESS: Yes.

11 BY MR. USDIN:

12 Q Do you recall receiving this draft?

13 A Yes.

14 Q And you reviewed it?

15 A Yes.

16 Q At the time you reviewed it did you also
17 look through your file?

18 A Yes.

19 Q And you reviewed it for accuracy; right?

20 A As best I can recall at that time, yes.

21 Q This was based on information at least as
22 it pertains to you that you had provided to him;

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1 right?

2 A That is correct.

3 Q And that was what led to the sworn
4 declaration we have already seen?

5 A Yes.

6 Q The execution of it; correct?

7 A That is correct.

8 Q Mr. Kuesters never asked you to
9 misrepresent anything to the PTO, did he?

10 A He did not. And I did not misrepresent
11 anything to the PTO at that time to the best of my
12 information and knowledge and belief. It is what I
13 thought was true based on what I could reconstruct
14 from my files for the date of February 18th, 1993.

15 Q And that was based on reconstruction as you
16 said from your own files.

17 A That is correct.

18 Q And the documents you had in it.

19 A That is correct. And then what happened in
20 my life. That's true.

21 Q And you received a copy of the petition
22 that we will mark for identification as P-58 which

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bears a Bates number starting with N001378 and
continuing on. You received a copy of that?

A Yes.

Q From Mr. Kuesters after he filed it; right?

A That is correct.

(The document referred to was
marked Plaintiff's Exhibit
No. 58 for identification.)

BY MR. USDIN:

Q I'm showing you a document that we will
mark as P-59 which bears Bates number N351. That is
the enclosure letter that sent it; right?

A That is correct.

(The document referred to was
marked Plaintiff's Exhibit
No. 59 for identification.)

BY MR. USDIN:

Q After you received the actual filed
amendment or papers did you review it?

A What? This?

Q Yes.

A I don't recall.

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1 Q So you don't recall seeing anything in
2 there you felt was inaccurate or in error; is that
3 correct?

4 A That is correct.

5 Q And this too was rejected; right?

6 A That is correct.

7 Q Let me show you a document that we will
8 mark for identification as P-60. It starts with Bates
9 number N000342 and continues on from there. It is a
10 fax cover sheet and August 17th transmittal letter
11 showing a CC to you and then a decision by the PTO;
12 correct?

13 A Yes.

14 Q And you received all of that from
15 Mr. Kuesters?

16 A That's correct.

17 Q And at the time you received this you
18 reviewed the decision?

19 A Yes.

20 Q And in the decision you were criticized by
21 the U.S. PTO for allowing an interviewee unsupervised
22 access to a very important docketing system; correct?

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1 A That is correct.
 2 Q And they questioned whether or not you
 3 performed a manual review of your cases to ensure you
 4 missed entering an important deadline; is that
 5 correct?
 6 A That's correct.
 7 Q Did you conduct such a manual review?
 8 A I don't recall.
 9 Q You don't recall doing one?
 10 A I don't recall doing one one way or
 11 another. I recall trying to reconstruct the docket
 12 from what was deleted and what was missing, but I
 13 don't recall further.
 14 Q Further?
 15 A I don't recall anything further.
 16 Q And the PTO also pointed out that you
 17 presumably considered yourself capable of working
 18 since you continued to do so; right?
 19 A That's with my affliction.
 20 Q Yeah, with respect to your foot disease.
 21 A Oh, sure. Yes. That's because -- okay.
 22 Q And in fact the PTO stated, and I'm

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1 for identification as P-61, starting with Bates number
 2 N001419, were you sent a copy of this when it was
 3 filed as well, Mr. Newman?
 4 A I don't recall.
 5 Q This was produced out of your files. Does
 6 that help you recall?
 7 A Then we must have a copy.
 8 MS. MANNING: Let me correct something.
 9 Mr. Newman produced a copy of the file wrapper on this
 10 patent so it may be the simple fact it has an N number
 11 does not necessarily mean it was in his file. It
 12 could have been a part of the patent wrapper. In fact
 13 I think the fact it is legal size suggests it came
 14 from the file wrapper.
 15 MR. USDIN: Okay, that's fine.
 16 (The document referred to was
 17 marked Plaintiff's Exhibit
 18 No. 61 for identification.)
 19 BY MR. USDIN:
 20 Q Did he consult, did he meaning Mr. Kuesters
 21 consult with you regarding the preparation of the
 22 renewed request for reconsideration that we marked as

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1 quoting, that the showing of record is that this
 2 application became abandoned due to Newman's failure
 3 to exercise the degree of care and diligence that is
 4 generally used and observed by prudent and careful
 5 persons in relation to the most important business in
 6 responding to the office action of January 19th, 1993.
 7 Do you recall them saying that?
 8 A Yes.
 9 Q Did you understand that these comments were
 10 specifically directed at you?
 11 A Yes.
 12 (The document referred to was
 13 marked Plaintiff's Exhibit
 14 No. 60 for identification.)
 15 BY MR. USDIN:
 16 Q Now eventually Mr. Kuesters filed yet
 17 another petition for relief; right?
 18 A That is correct.
 19 Q A renewed request for reconsideration;
 20 right?
 21 A Yes.
 22 Q Showing you a document that we will mark

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1 P-61?
 2 A Through my attorneys.
 3 Q Okay. And which attorneys were those?
 4 A Henri Wolbrette and Kathleen Manning.
 5 Q And those are your counsel in this case.
 6 A Yes.
 7 Q That petition was what ultimately led to
 8 the patent being revived?
 9 A That is correct.
 10 Q And ultimately issued; right?
 11 A That is correct.
 12 Q Now during the period that the patent was
 13 abandoned Axonn had no patent protection obviously
 14 relating to the abandoned patent; correct?
 15 A For that particular patent?
 16 Q Yes.
 17 A Yeah, that's correct.
 18 Q And for whatever period was terminally
 19 disclaimed they also had no patent protection even
 20 after it was revived; correct? For that particular
 21 patent.
 22 A Well, terminal disclaimer is for the period

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1 while it was abandoned, so that's the period they
2 lost.

3 Q Did they lose anything on the tail end?

4 A Well, the tail end is adjusted. The way
5 they do the terminal disclaimer, the terminal
6 disclaimer is to make it so that Axonn does not get
7 the benefit of the patent, of the issued patent in 17
8 years. So if it issued here in January 1997, they
9 don't get the additional benefit of the abandonment
0 for the two or so years, two and a half years, almost
1 three years it was abandoned added to. So they have a
2 protection starting January 1997. Basically it puts
3 them back to where they would have been had the patent
4 issued in the normal course of business. It would
5 have terminated roughly in 2011.

6 Q So had they gotten the patent without an
7 abandonment, what would have been the term of the
8 patent?

9 A Based on the numbers of the issued patent
0 now?

1 Q Yes. Okay.

2 MR. WOLBRETTE: In other words, assuming

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1 issued had there not been an abandonment assuming it
2 happened the way it did.

3 A The way the Patent Office assumes. So what
4 they are doing is terminally disclaiming on the end so
5 you don't get a bonus on the end because you would
6 have had your patent from February 1994 up until, you
7 know, to December 1996.

8 Q But as it was abandoned during that period,
9 they had no patent, they would have had no patent
0 protection starting February of 1994 based on the
1 assumptions that we have just been through; correct?

2 A Had it issued in the normal course of
3 events and there were no other office actions.

4 Q Correct.

5 A February '94, and had it issued in July
6 '93, then it would have terminated in July of 2010
7 roughly. So it is a sliding window of 17 years. But
8 we are using that as where in fact it ended up by the
9 dates they got.

0 Q But if all other things being equal, having
1 happened the same, had there not been the period of
2 abandonment, it would have issued in February of 1994;

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1 that if there had been no abandonment, just taking
2 that period and assuming everything else would have
3 stayed the same; right? Because we obviously have no
4 way of knowing how long it would have taken to have
5 those.

6 MR. USDIN: Assuming what happened happened
7 after it was revived.

8 THE WITNESS: Okay. It was January 1997 it
9 issued.

10 BY MR. USDIN:

11 Q Correct.

12 A So you had 17 years. That takes you to
13 year two thousand, January 2014.

14 Q Correct.

15 A Minus 35 months. That takes you to
16 February of 2011?

17 Q Right.

18 A Okay. So the patent had it issued would
19 have roughly ended 2011, February 2011. So back up 17
20 years from 2011. That means it would have issued
21 roughly February 1994.

22 Q Okay. That's when the patent would have

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1 correct?

2 A That is correct.

3 Q And it then would have terminated in 2011.

4 A February 2011.

5 Q So as a result of the abandonment, they did
6 not have patent protection starting in February '94.
7 Instead they have it starting in January 1997;
8 correct?

9 A It is not they didn't have patent
10 protection. They had patent protection.

11 Q But not on this patent.

12 A Not on this patent they didn't have patent
13 protection.

14 Q They didn't have patent protection on this
15 patent until January of 1997; correct?

16 A That is correct.

17 Q And when does it now expire?

18 MR. WOLBRETTE: I thought he said February
19 2011.

20 THE WITNESS: February 2011.

21 BY MR. USDIN:

22 Q Okay. And now at some point in the last

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1 few years the law changed to give you patent
2 protection from 17 to 20 years; is that right?

3 A That is correct.

4 Q When did that law change?

5 A That was on June 8th, 1995.

6 Q What patents are allowed the 20-year
7 period? Those that are issued before that date?

8 A Patents filed after that date have 20 years
9 from the filing date. There was a grace period now
10 and I forget what the period is. But there was.

11 Q Let me ask you this way.

12 A I forget.

13 Q Had the Axonn abandoned patent issued in
14 February '94 as we just discussed, would it have
15 gotten the 20-year term?

16 A No.

17 Q So it still would have only had the 17-year
18 term?

19 A No. There is no such thing as a 20-year
20 patent term. That's a misnomer. What it is is your
21 patent protection is 20 years from the filing date
22 after the patent issues. So if your patent takes two

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1 years to issue because of prosecution in the Patent
2 Office, then you get 18 years minus two. Rather, you
3 get 20 years minus two, which is 18 years of patent
4 protection. But if it takes three years, you end up
5 with 17 years.

6 Q So it's 20 years from the filing date.

7 A From the first or earliest filing date,
8 that's correct.

9 Q What patents get to take advantage of that
10 particular provision?

11 A Patents filed after June 8th, 1995.

12 Q Okay. So it doesn't have anything to do
13 with when they issued.

14 A I think your question is unclear. I don't
15 know what you're talking about.

16 Q Okay. Would Axonn have had any additional
17 patent protection had its patent issued in February
18 1994 instead of January 1997 as a result of the change
19 in the patent law that allowed 20 years from the
20 filing date?

21 A I don't believe so.

22 Q So would they have had any less patent

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1 protection? Did they have less patent protection by
2 virtue of the fact of the abandonment?

3 A Well, reask the question because you are
4 getting -- see, it's from the first filing date. So
5 had this been calculated -- had this patent
6 application fallen under the new law, which it does
7 not, but had it fallen under the June 8th, 1995 law,
8 you would go to the earliest filing date of 1988.
9 Your maximum patent protection would be to the year
10 2008. So you would have had less patent protection
11 had the case been filed. But this case wasn't filed
12 after June 8th, 1995. It had a filing date before
13 that date.

14 Q So it was unaffected is what you are
15 saying.

16 A Yes.

17 Q Mr. Newman, at the time a response was due
18 to the U.S. PTO's May of 1992 office action you were
19 the patent attorney for Axonn who had responsibility
20 for that response; correct?

21 A That is correct.

22 Q And that response was prepared by Anthony

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1 Natoli under your supervision as your associate agent;
2 correct?

3 A That is correct.

4 Q And the response was not complete because
5 it did not include declarations from all three
6 inventors; correct?

7 A Well, it was complete in that it addressed
8 the issue. That makes it complete. But it did not
9 include the declarations. He addressed that we did
10 not have them available. To be not complete or
11 nonresponsive you normally miss it. You don't address
12 it.

13 Q But it did not have the declarations of all
14 three inventors; correct?

15 A That is correct.

16 Q And the PTO therefore rejected or
17 considered it to be nonresponsive; correct?

18 A They gave an office action in response to
19 that, that's correct.

20 Q A negative office action; correct?

21 A All office action, virtually all office
22 actions are negative, so yes.

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1 Q And you cannot recall today whether you
 2 were aware in advance of the filing deadline that you
 3 would not have declarations from all the inventors; is
 4 that correct?
 5 A What, prior to --
 6 Q The November 1992 filing.
 7 A Oh, prior to that?
 8 Q Yes.
 9 A I cannot recall, that is correct.
 0 Q You never drafted any documents or took any
 1 steps towards filing a petition under CFR 183, did
 2 you?
 3 A For this case?
 4 Q Yes.
 5 A No, I did not.
 6 Q Or under 147?
 7 A 1.47?
 8 Q Yes, 1.47.
 9 A Neither of those, because those both
 0 required an affidavit, disgruntled employee affidavit
 1 basically, signed by Britton Sanderford, and they did
 2 not want me to proceed with preparing that

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1 A I don't recall.
 2 Q You don't recall any such, do you?
 3 A No. Except for the telephone conferences
 4 with Michael Eckstein and Erin and the telephone
 5 conference with Michael Eckstein and Britton
 6 Sanderford, which we have discussed already, I don't
 7 recall.
 8 Q Ms. Pierce didn't give you any
 9 instructions, did she?
 0 A No, she did not.
 1 Q And Mr. Sanderford didn't either, did he?
 2 A I don't recall.
 3 Q When you submitted a declaration to the
 4 U.S. PTO, the only reasons you gave for failing to
 5 respond, and this is the declaration that you signed,
 6 were complications from your foot condition and the
 7 collapse of your docketing system; right?
 8 A No, that's not true. I gave a declaration
 9 as to why I missed the date of February 18th.
 0 Q All right. That's fine.
 1 A And that was the reason why. It is not the
 2 total reasons. The other reasons, there were no other

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1 declaration.
 2 Q But you didn't draft it or file it.
 3 A So they didn't want me to, I didn't do it,
 4 that's right.
 5 Q At the time a response was due to the U.S.
 6 PTO's January 19th, 1993 office action you were the
 7 patent attorney for Axonn responsible for that
 8 response; correct?
 9 A Yes.
 0 Q And that response was due on or before
 11 February 18th, 1993; correct?
 12 A That is correct.
 13 Q And no response was filed by the due date;
 14 correct?
 15 A That is correct.
 16 Q And because no response was filed, the U.S.
 17 PTO declared the application to be abandoned; correct?
 18 A That is correct.
 19 Q You never had an instruction from Britton
 20 Sanderford that you not file anything in response to
 21 the January 1993 office action, did you? Do you want
 22 it read back?

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1 reasons discussed.
 2 Q At the time a petition to revive under
 3 137(b) was filed in January 1994 you were the patent
 4 attorney responsible for the revival effort?
 5 A That is correct.
 6 Q And that petition was dismissed as moot
 7 because it was filed more than a year after the
 8 abandonment?
 9 A That is correct. But ultimately it was,
 10 the case was ultimately revived based on a combination
 11 of the due process argument that that was the proper
 12 date along with in the interest of justice. That was
 13 the last -- and that was the argument we supplied
 14 Mr. Kuesters. So the answer is that was initially
 15 dismissed as moot, but ultimately the Patent Office
 16 allowed the case.
 17 Q When Mr. Kuesters filed you mean.
 18 A Yeah. Yes, that is correct.
 19 MR. WOLBRETTE: When Mr. Kuesters filed it
 20 with the argument we supplied.
 21 BY MR. USDIN:
 22 Q And when you filed a petition to revive

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1 under 137(a) in May of 1994 you did not include
2 declarations from all three inventors; correct?

3 A That is correct.

4 Q And that is why that petition was
5 dismissed; correct?

6 A That was why, because the rule only
7 requires declarations. It doesn't say in the rule all
8 three inventors, and that should have been sufficient
9 to have a declaration by the party of interest, in
10 this case Axonn, and the declaration signed by the
11 president of Axonn would be representative for the
12 patentee or the party of interest.

13 Q But the reason they gave for dismissing was
14 because all three declarations were not provided;
15 correct?

16 A That is correct.

17 Q And they rejected the 137(a) petition
18 because they said there had been inadequate showing of
19 the cause of any alleged unavoidable delay?

20 A Which one is this?

21 Q The 137(a) in May of 1994.

22 A Due to the -- it was due to the

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1 nonsignature of all the inventors.

2 Q Did you, Mr. Newman, as an attorney
3 consider that the U.S. PTO's conclusion that the
4 application became abandoned due to your failure to
5 exercise a degree of care and diligence generally used
6 and observed by prudent and careful persons in
7 relation to the most important business in responding
8 to the office action of January 19th, 1993, did you as
9 a lawyer consider that to be a conclusion by the PTO
10 that you were negligent?

11 A At the time?

12 Q Yes.

13 A Yes.

14 MR. USDIN: Hang on one second. We may be
15 about through.

16 (Brief pause.)

17 BY MR. USDIN:

18 Q Let me show you one more document that we
19 will mark for identification as P-62. This is the
20 decision, is it not, by the U.S. PTO which revived the
21 patent? Right?

22 A Yes.

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1 Q Can you take a moment and read that and
2 then tell me what portion of it relates to the due
3 process argument, if we can call it that, that you say
4 you provided, or your attorneys provided.

5 (The document referred to was
6 marked Plaintiff's Exhibit
7 No. 62 for identification.)

8 MR. USDIN: I would like the witness to do
9 it if we can, please, counsel.

10 MR. WOLBRETTE: Why is this relevant?

11 MR. USDIN: What?

12 MR. WOLBRETTE: Why is this relevant? He
13 testified to it. That's his opinion.

14 MR. USDIN: Well, I'm asking him what he is
15 basing his opinion on.

16 THE WITNESS: What? Which opinion?

17 MR. WOLBRETTE: You want him to cite the
18 provisions that they cited?

19 MR. USDIN: Yeah, he said that --

20 MR. WOLBRETTE: Well, it speaks for itself.

21 It says "The petition under CFR" --

22 MR. USDIN: I would like the witness to

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1 answer the question. I don't think it is proper at
2 all for you to take the document from the witness and
3 to provide his answer. He testified to it. I would
4 like him to testify.

5 MR. WOLBRETTE: I think the document speaks
6 for itself. It cites provisions. It says "The
7 petition under 37 CFR 1.137(a) and 37 CFR 1.137(b) to
8 waive the one year filing period requirement in 37 CFR
9 1.137(b) and to revive the above-identified
10 application is granted." Now what more do you want to
11 know besides that?

12 MR. USDIN: I would like to know if there
13 are any portions of this decision that address the due
14 process argument that your attorney says is involved
15 in that conclusion.

16 MR. WOLBRETTE: Maybe you ought to pull out
17 Mr. Kuesters' petition and you will find that the only
18 reference that cites those two articles of the CFR are
19 his due process argument.

20 MR. USDIN: Can we let the witness testify?

21 MR. WOLBRETTE: I think you ought to let
22 Mr. Kuesters testify about this, frankly.

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MR. USDIN: You will have your day with that.

MR. WOLBRETTE: You are absolutely right about that.

MR. USDIN: So right now we have Mr. Newman.

THE WITNESS: Mr. Henri is correct. The reference, the only reference for the one-year filing period which is waived and revive the above patent application is granted came from the due process argument. You have to remember in the renewed petition to revive, that was the added argument from his prior petition, under the grounds of the one year, the due process requirement of one year and the other terms as given in this ruling. So in my opinion the only conclusion you are going to have of that argument is what was different from the prior petition that was not granted.

BY MR. USDIN:

Q Is there any particular discussion in here that you think supports that?

A Offhand I would have to sit here and study

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1993, that the refusal of one inventor to cooperate did not justify delay in prosecution. That's what you testified to. And if that is the case, then what was your basis for filing a petition under 137(a) subsequent to that?

A They were in a situation that their hands were tied because of the James Arthur suit and again the James Arthur refusing to cooperate. And I viewed this at that time in my judgment in February of 1993 that this was an unintentional situation, that Axonn did not intentionally bring upon itself, that was inflicted on them by James Arthur. And that was the basis for that.

Q 137(a) is unavoidable delay; correct?

A That is correct.

MR. WOLBRETTE: Maybe there is no communication. If the question was unavoidable and your question was unintentional, there is no hookup between the question and the answer. Maybe it ought to be asked again.

BY MR. USDIN:

Q Let me ask it this way then. Did you ever

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this.

Q Go ahead and take a minute. It is only a little over two pages. We are about done. I will be checking my thoughts on anything else we need to ask you.

(Brief pause.)

A Okay. To support that, they cite the provision and that's it.

Q So you are referring to the same paragraph, the fourth paragraph in the decision.

A The fourth paragraph and also further down as they go through this they are citing the same procedures I cite, in the interest of justice and in the due process argument. They relied on the interest of justice, but the argument of due process was the added value in the brief of Mr. Kuesters. That was added in his brief that revived the case different from the prior brief.

Q Okay. One more question, if I can ask you this one. You testified, we had some fairly prolonged discussion as a matter of fact, that you did tell Axonn before February of 1993, before February 18th,

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tell Axonn prior to February 18th, 1993 that the refusal of an inventor to cooperate would be considered an unavoidable delay?

A That it was an unavoidable situation?

Q Did you ever tell Axonn prior to February 18th, 1993 that the refusal of one inventor to cooperate would be considered an avoidable, an avoidable delay?

A You are asking me whether it's an avoidable -- I'm getting so tired here. My head is spinning around. You are asking me if I told prior to February 18th, 1993 if the refusal was avoidable. Because they were in a situation with James Arthur not signing and James Arthur's lawsuit. They were put in an unavoidable situation. They were put in the unavoidable situation. And at the time I saw it as an unintentional situation. I saw it as an unintentional situation. Axonn did not intentionally bring it upon themselves.

Q But the 137(a) petition is unavoidable delay; right?

A That's correct.

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1 MR. WOLBRETTE: 137(a) is.

2 MR. USDIN: I was asking about (a). My
3 question was (a).

4 MR. WOLBRETTE: We have had all kinds of
5 testimony about unintentional. He is asking whether
6 back before February you ever discussed with them
7 unavoidable.

8 THE WITNESS: Unavoidable, not
9 unintentional.

10 MR. USDIN: Correct.

11 MR. WOLBRETTE: Yes.

12 THE WITNESS: I don't recall.

13 BY MR. USDIN:

14 Q You don't recall ever telling them that; is
15 that right?

16 A On the unavoidable situation, no, I don't
17 recall, and it was not foreseeable because they would
18 be filing a petition to revive this for that reason.

19 Q Just so it's clear, you don't recall having
20 discussions with anyone in Axonn prior to February
21 18th, 1993 that the failure to get Arthur to execute a
22 declaration would be considered an avoidable delay

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1 that would not allow the patent to be revived
2 subsequent. You don't remember discussing that with
3 anyone at Axonn; is that right?

4 A Avoidable delay? I don't recall at this
5 time.

6 Q You don't recall that discussion, do you?

7 A That's right.

8 Q One last thing actually. I don't know if
9 we need to do this on the record or not.

10 MR. USDIN: Let's go off the record a
11 second.

12 (Discussion off the record.)

13 MR. WOLBRETTE: Just let the record reflect
14 that I handed counsel a copy of the insurance policy.
15 It is not a certified copy. It is a copy that was
16 brought over from Mr. Newman's office by one of his
17 employees during the deposition as requested.

18 BY MR. USDIN:

19 Q And Mr. Newman, this policy came from your
20 files I take it.

21 A I guess. I haven't seen it. I wouldn't
22 know if it did or not.

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1 Q You wouldn't know if it did or not?

2 A Not right now.

3 Q Ms. Molvin brought it to us while we are
4 here.

5 MR. WOLBRETTE: We believe it to be the
6 policy, but it is not certified so whether it has all
7 the proper pages or not I can't tell you.

8 MS. MANNING: When we get the certified
9 copy, we will be able to tell whether it is the full
10 policy.

11 MR. WOLBRETTE: But we believe it is a copy
12 of the insurance policy.

13 MR. USDIN: Okay.

14 EXAMINATION BY COUNSEL FOR THE DEFENDANTS

15 BY MR. WOLBRETTE:

16 Q I have a question. Do you remember the
17 October 5th letter from Mr. Eckstein that apparently
18 was faxed to your office sometime, the November 5th,
19 I'm sorry, 1993 letter faxed to your office sometime
20 around 5:00 p.m. on Friday? Do you remember that
21 letter?

22 A Yes.

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1 Q The one that talks about Mr. Arthur's
2 attorney may be willing to let Arthur sign or words to
3 that effect?

4 A That is correct.

5 Q Can you find that letter?

6 Here it is. It is right on top.

7 The letter begins "I have had conversations
8 with James Arthur's attorney regarding the document
9 you forwarded to Britton last week for execution by
10 James vis-a-vis the abandoned divisional. In
11 conversations with James' attorney, he has stated that
12 he may consider advising James to sign the document
13 but he needs further information." And so on and so
14 forth.

15 Now I just wanted to clarify something that
16 I may have misunderstood. And Ms. Manning's notes
17 reflect something different from what I thought I
18 heard. But let's make it clear. I thought I
19 understood you to say that when you got this letter,
20 this indicated to you that Mr. Arthur was prepared to
21 sign the affidavit at long last.

22 A Oh, no. This does not indicate that. That

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1 is not what this letter indicates.

2 MR. WOLBRETTE: Thank you.

3 FURTHER EXAMINATION BY COUNSEL FOR THE PLAINTIFF

4 BY MR. USDIN:

5 Q With respect to the November 5th letter,
6 did the letter indicate to you at the time that there
7 was at least more optimism that he might sign it, that
8 there was progress being made in getting him to sign
9 it?

10 A It indicates to me that they are having
11 problems. If you look at this, it is stating here in
12 conversation with James' attorney, he has stated that
13 he may consider advising James. It doesn't say he
14 will. He may consider. But he needs further
15 information. He as James' attorney asked that we
16 forward him the original document that was executed by
17 James, a marked up assignment correcting the
18 information relating to Robert Rouquette, et cetera,
19 the new document you forwarded to James and a brief
20 explanation as to what was forwarded previously and
21 what was being forwarded at that time in layman
22 language. These all indicate a problem in that he

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(Whereupon, at 4:15 p.m. the deposition was
adjourned.)

(I have read the foregoing
pages of this transcript of
my deposition and, as
corrected in my handwriting
and/or on the attached errata
sheet, this is a true and
accurate reflection of my
testimony.)

DAVID B. NEWMAN, JR.

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1 may, but it didn't say he will sign.

2 Q Up until the date of this letter did you
3 have any information that he was even willing to
4 consider signing it?

5 A Yes.

6 Q What was that information based on?

7 A That is the indication from Britton
8 Sanderford whose letter made it to me and from our
9 discussions with Axonn, this is a done deal, that he
10 was ready to sign. So we prepared the documentation,
11 sent it to Axonn for them to get his signature.

12 Q And did it happen?

13 A No.

14 MR. WOLBRETTE: Not until December 23rd.

15 THE WITNESS: Not before November 8th or so
16 of 1993. Not before that date.

17 MR. WOLBRETTE: December 22nd, I correct
18 myself.

19 THE WITNESS: Yeah, it did happen in
20 December ultimately.

21 MR. USDIN: That's all I have. Thank you.
22

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1 CERTIFICATE OF NOTARY PUBLIC

2 I, Karen Hinnenkamp, the officer before whom the
3 foregoing deposition was taken, do hereby certify that
4 the witness whose testimony appears in the foregoing
5 deposition was duly sworn by me; that the testimony of
6 said witness was taken by me in machine shorthand and
7 thereafter reduced to writing by means of
8 computer-aided transcription; that said deposition is
9 a true record of the testimony given by said witness;
10 that I am neither counsel for, related to, nor
11 employed by any of the parties to the action in which
12 this deposition was taken; and further that I am not a
13 relative or employee of any attorney or counsel
14 employed by the parties thereto, nor financially or
15 otherwise interested in the outcome of the action.
16
17
18
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21
22

Notary Public in and for
the State of Maryland

My commission expires:

March 1, 2001

1

David B. Newman, Jr.
201 Centennial Street
Centennial, Maryland Suite 2D
La Plata, Maryland 20646

Dear Mr. Newman:

Please find enclosed for your convenience the original of your deposition transcript for you to read and sign. Unless otherwise instructed by counsel, the deposition transcript must be returned within 30 days to Mr. Usdin for appropriate processing. It is advised that you check with counsel as to any upcoming trial dates in order to ensure timely return of this transcript.

In reviewing the transcript, if any changes or corrections are necessary, please insert the change or correction at the appropriate places without obliterating the typewriting and initial at the right-hand margin. Please keep in mind that the purpose of your review is only to ensure accuracy and not to revise in an editorial manner.

When your review is completed, please sign at the page indicated for your signature in the transcript. After you have read and signed the transcript, please list the changes or corrections on the enclosed errata sheet form, spelling out by page and line number the changes noted by you in handwriting in the transcript, and then forward copies to all counsel. The procedures for accomplishing this are also enclosed.

If you have any questions, please do not hesitate to contact this office for further instructions. Thank you for your cooperation.

Sincerely yours,
Karen Hinnenkamp
Notary/Reporter

cc: Steve Usdin, Esq.
Henri Wolbrette, III, Esq.

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\$

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